Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Planes, Trains & Automobiles

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129 S.Ct. 1710
Supreme Court of the United States

ARIZONA, Petitioner,

v.

Rodney Joseph GANT.

No. 07–542.
|
Argued Oct. 7, 2008.
|
Decided April 21, 2009.

Synopsis

Background: Defendant was convicted in the Superior Court, Pima County, Clark W. Munger, J., of possession of a narcotic drug for sale and possession of drug paraphernalia. Defendant appealed. The Court of Appeals of Arizona, 202 Ariz. 240, 43 P.3d 188, reversed. The United States Supreme Court granted State's petition for certiorari, and subsequently vacated and remanded. The Court of Appeals of Arizona remanded for evidentiary hearing on legality of warrantless search. On remand, the Superior Court, Pima County, Barbara C. Sattler, Judge Pro Tempore, found no violation. Defendant appealed. The Court of Appeals of Arizona, Brammer, J., 213 Ariz. 446, 143 P.3d 379, reversed. State petitioned for review. The Supreme Court of Arizona, Berch, Vice Chief Justice, 216 Ariz. 1, 162 P.3d 640, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Stevens, held that:

search of defendant's vehicle while he was handcuffed in patrol car was unreasonable, and

doctrine of stare decisis did not require Supreme Court to adhere to broad reading of its prior decision in *New York v. Belton*.

Affirmed.

Justice Scalia filed concurring opinion.

Justice Breyer filed dissenting opinion.

Justice Alito filed dissenting opinion in which Chief Justice Roberts and Justice Kennedy joined, and which Justice Breyer joined in part.

****1712** *Syllabus* [*]

Respondent Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket. The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses. Reversing, the State Supreme Court distinguished *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768—which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent occupant's lawful arrest—on the ground that it concerned the scope of a search incident to arrest but did not answer the question whether officers may conduct such a search once the scene has been secured. Because *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, requires that a search incident to arrest be justified by either the interest in officer safety or the interest in preserving evidence and the circumstances of Gant's arrest implicated neither of those interests, the State Supreme Court found the search unreasonable.

Held: Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search ****1713** or that the vehicle contains evidence of the offense of arrest. Pp. 1716 – 1724.

(a) Warrantless searches "are *per se* unreasonable," "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. The exception for a search incident to a lawful arrest applies only to " the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." *Chimel,* 395 U.S., at 763, 89 S.Ct. 2034. This Court applied that exception to the automobile context in *Belton*, the holding of which rested in large part on the assumption that articles inside a vehicle's passenger compartment are "generally ... within 'the area into which an arrestee might reach.' " 453 U.S., at 460, 101 S.Ct. 2860. Pp. 1716 – 1718.

(b) This Court rejects a broad reading of *Belton* that would permit a vehicle search incident to a recent occupant's arrest

even if there were no possibility the arrestee could gain access to the vehicle at the time of the search. The safety and evidentiary justifications underlying *Chimel* 's exception authorize a vehicle search only when there is a reasonable possibility of such access. Although it does not follow from *Chimel,* circumstances unique to the automobile context also justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton v. United States,* 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (SCALIA, J., concurring in judgment). Neither *Chimel* 's reaching-distance rule nor *Thornton* 's allowance for evidentiary searches authorized the search in this case. In contrast to *Belton,* which involved a single officer confronted with four unsecured arrestees, five officers handcuffed and secured Gant and the two other suspects in separate patrol cars before the search began. Gant clearly could not have accessed his car at the time of the search. An evidentiary basis for the search was also lacking. Belton and Thornton were both arrested for drug offenses, but Gant was arrested for driving with a suspended license—an offense for which police could not reasonably expect to find evidence in Gant's car. Cf. *Knowles v. Iowa,* 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492. The search in this case was therefore unreasonable. Pp. 1718 – 1720.

(c) This Court is unpersuaded by the State's argument that its expansive reading of *Belton* correctly balances law enforcement interests with an arrestee's limited privacy interest in his vehicle. The State seriously undervalues the privacy interests at stake, and it exaggerates both the clarity provided by a broad reading of *Belton* and its importance to law enforcement interests. A narrow reading of *Belton* and *Thornton,* together with this Court's other Fourth Amendment decisions, *e.g., Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201, and *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572, permit an officer to search a vehicle when safety or evidentiary concerns demand. Pp. 1719 – 1721.

(d) *Stare decisis* does not require adherence to a broad reading of *Belton.* The experience of the 28 years since *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded, and blind adherence to its faulty assumption would authorize myriad unconstitutional searches. Pp. 1722 – 1724.

216 Ariz. 1, 162 P.3d 640, affirmed.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, pp. 1724 – 1725. BREYER, J., filed ****1714** a dissenting opinion, *post*, pp. 1725 – 1726. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and KENNEDY, J., joined, and in which BREYER, J., joined except as to Part II–E, *post*, pp. 1726 – 1732.

CERTIORARI TO THE SUPREME COURT OF ARIZONA

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Opinion

Justice STEVENS delivered the opinion of the Court.

***335** After Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat. Because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search, the Arizona Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and applied to vehicle searches in *New York v. Belton,*

453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), did not justify the search in this case. We agree with that conclusion.

Under *Chimel,* police may search incident to arrest only the space within an arrestee's " 'immediate control,' " meaning "the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S., at 763, 89 S.Ct. 2034. The safety and evidentiary justifications underlying *Chimel* 's reaching-distance rule determine *Belton* 's scope. Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Consistent with the holding in *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), and following the suggestion in Justice SCALIA's opinion concurring in the judgment in that case, *id.,* at 632, 124 S.Ct. 2127, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

I

On August 25, 1999, acting on an anonymous tip that the residence at 2524 North Walnut Avenue was being used to sell drugs, Tucson police officers Griffith and Reed knocked on the front door and asked to speak to the owner. Gant answered the door and, after identifying himself, stated ****1715** that ***336** he expected the owner to return later. The officers left the residence and conducted a records check, which revealed that Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license.

When the officers returned to the house that evening, they found a man near the back of the house and a woman in a car parked in front of it. After a third officer arrived, they arrested the man for providing a false name and the woman for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived. The officers recognized his car as it entered the driveway, and Officer Griffith confirmed that Gant was the driver by shining a flashlight into the car as it drove by him. Gant parked at the end of the driveway, got out of his car, and shut the door. Griffith, who was about 30 feet away, called to Gant, and they approached each other, meeting 10–to–12 feet from Gant's car. Griffith immediately arrested Gant and handcuffed him.

Because the other arrestees were secured in the only patrol cars at the scene, Griffith called for backup. When two more officers arrived, they locked Gant in the backseat of their vehicle. After Gant had been handcuffed and placed in the back of a patrol car, two officers searched his car: One of them found a gun, and the other discovered a bag of cocaine in the pocket of a jacket on the backseat.

Gant was charged with two offenses—possession of a narcotic drug for sale and possession of drug paraphernalia (*i.e.,* the plastic bag in which the cocaine was found). He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. Among other things, Gant argued that *Belton* did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. When asked at the ***337** suppression hearing why the search was conducted, Officer Griffith responded: "Because the law says we can do it." App. 75.

The trial court rejected the State's contention that the officers had probable cause to search Gant's car for contraband when the search began, *id.,* at 18, 30, but it denied the motion to suppress. Relying on the fact that the police saw Gant commit the crime of driving without a license and apprehended him only shortly after he exited his car, the court held that the search was permissible as a search incident to arrest. *Id.,* at 37. A jury found Gant guilty on both drug counts, and he was sentenced to a 3–year term of imprisonment.

After protracted state-court proceedings, the Arizona Supreme Court concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment. The court's opinion discussed at length our decision in *Belton,* which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of an arrest of the vehicle's recent occupant. 216 Ariz. 1, 3–4, 162 P.3d 640, 642–643 (2007) (citing 453 U.S., at 460, 101 S.Ct. 2860). The court distinguished *Belton* as a case concerning the permissible scope of a vehicle search incident to arrest and concluded that it did not answer "the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure." 216 Ariz., at 4, 162 P.3d, at 643. Relying on our earlier decision in *Chimel,* the court observed that the search-incident-to-arrest exception to the warrant requirement is justified by ****1716** interests

in officer safety and evidence preservation. 216 Ariz., at 4, 162 P.3d, at 643. When "the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer," the court concluded, a "warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or ***338** prevent the destruction of evidence." *Id.,* at 5, 162 P.3d, at 644. Accordingly, the court held that the search of Gant's car was unreasonable.

The dissenting justices would have upheld the search of Gant's car based on their view that "the validity of a *Belton* search ... clearly does not depend on the presence of the *Chimel* rationales in a particular case." *Id.,* at 8, 162 P.3d, at 647. Although they disagreed with the majority's view of *Belton,* the dissenting justices acknowledged that "[t]he bright-line rule embraced in *Belton* has long been criticized and probably merits reconsideration." 216 Ariz., at 10, 162 P.3d, at 649. They thus "add[ed their] voice[s] to the others that have urged the Supreme Court to revisit *Belton.*" *Id.,* at 11, 162 P.3d, at 650.

The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles. We therefore granted the State's petition for certiorari. 552 U.S. 1230, 128 S.Ct. 1443, 170 L.Ed.2d 274 (2008).

II

Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted). Among the exceptions to the warrant requirement is a search incident to a lawful arrest. See *Weeks v. United States,* 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914). The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. See *United States v. Robinson,* 414 U.S. 218, 230–234, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Chimel,* 395 U.S., at 763, 89 S.Ct. 2034.

***339** In *Chimel,* we held that a search incident to arrest may only include "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Ibid.* That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. See *ibid.*(noting that searches incident to arrest are reasonable "*in order to* remove any weapons [the arrestee] might seek to use" and "*in order to prevent* [the] concealment or destruction" of evidence (emphasis added)). If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. *E.g., Preston v. United States,* 376 U.S. 364, 367–368, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964).

In *Belton,* we considered *Chimel* 's application to the automobile context. A lone ****1717** police officer in that case stopped a speeding car in which Belton was one of four occupants. While asking for the driver's license and registration, the officer smelled burnt marijuana and observed an envelope on the car floor marked "Supergold"—a name he associated with marijuana. Thus having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees,[1] the officer " 'split them up into four separate areas of the Thruway ... so they would not be in physical touching area of each other' " and searched the vehicle, including the pocket of a jacket on the backseat, in which he found cocaine. 453 U.S., at 456, 101 S.Ct. 2860.

***340** The New York Court of Appeals found the search unconstitutional, concluding that after the occupants were arrested the vehicle and its contents were "safely within the exclusive custody and control of the police." *State v. Belton,* 50 N.Y.2d 447, 452, 429 N.Y.S.2d 574, 407 N.E.2d 420, 423 (1980). The State asked this Court to consider whether the exception recognized in *Chimel* permits an officer to search "a jacket found inside an automobile while the automobile's four occupants, all under arrest, are standing unsecured around the vehicle." Brief in No. 80–328, p. *i*. We granted certiorari because "courts ha[d] found no workable definition of 'the area within the immediate control of the arrestee' when that

area arguably includes the interior of an automobile." 453 U.S., at 460, 101 S.Ct. 2860.

In its brief, the State argued that the Court of Appeals erred in concluding that the jacket was under the officer's exclusive control. Focusing on the number of arrestees and their proximity to the vehicle, the State asserted that it was reasonable for the officer to believe the arrestees could have accessed the vehicle and its contents, making the search permissible under *Chimel*. Brief in No. 80–328, at 7–8. The United States, as *amicus curiae* in support of the State, argued for a more permissive standard, but it maintained that any search incident to arrest must be " 'substantially contemporaneous' " with the arrest—a requirement it deemed "satisfied if the search occurs during the period in which the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed." Brief for United States as *Amicus Curiae* in *New York v. Belton,* O.T.1980, No. 80–328, p. 14. There was no suggestion by the parties or *amici* that *Chimel* authorizes a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle.

After considering these arguments, we held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the ***341** passenger compartment of the automobile" and any containers therein. *Belton,* 453 U.S., at 460, 101 S.Ct. 2860 (footnote omitted). That holding was based in large part on our assumption "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach.' " *Ibid.*

The Arizona Supreme Court read our decision in *Belton* as merely delineating "the proper scope of a search of the interior of an automobile" incident to an arrest, ****1718** *id.,* at 459, 101 S.Ct. 2860. That is, *when* the passenger compartment is within an arrestee's reaching distance, *Belton* supplies the generalization that the entire compartment and any containers therein may be reached. On that view of *Belton,* the state court concluded that the search of Gant's car was unreasonable because Gant clearly could not have accessed his car at the time of the search. It also found that no other exception to the warrant requirement applied in this case.

Gant now urges us to adopt the reading of *Belton* followed by the Arizona Supreme Court.

III

Despite the textual and evidentiary support for the Arizona Supreme Court's reading of *Belton,* our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. This reading may be attributable to Justice Brennan's dissent in *Belton,* in which he characterized the Court's holding as resting on the "fiction ... that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car." *Id.,* at 466, 101 S.Ct. 2860. Under the majority's approach, he argued, "the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car" before conducting the search. *Id.,* at 468, 101 S.Ct. 2860.

***342** Since we decided *Belton,* Courts of Appeals have given different answers to the question whether a vehicle must be within an arrestee's reach to justify a vehicle search incident to arrest,[2] but Justice Brennan's reading of the Court's opinion has predominated. As Justice O'Connor observed, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." *Thornton,* 541 U.S., at 624, 124 S.Ct. 2127 (opinion concurring in part). Justice SCALIA has similarly noted that, although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in "this precise factual scenario ... are legion." *Id.,* at 628, 124 S.Ct. 2127 (opinion concurring in judgment) (collecting cases).[3] Indeed, ****1719** some courts have upheld searches ***343** under *Belton* "even when ... the handcuffed arrestee has already left the scene." 541 U.S., at 628, 124 S.Ct. 2127 (same).

Under this broad reading of *Belton,* a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S., at

460, n. 3, 101 S.Ct. 2860. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.[4]

Although it does not follow from *Chimel,* we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton,* 541 U.S., at 632, 124 S.Ct. 2127 (SCALIA, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. See, *e.g.,* ***344** *Atwater v. Lago Vista,* 532 U.S. 318, 324, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *Knowles v. Iowa,* 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). But in others, including *Belton* and *Thornton,* the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton,* which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas Belton and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. Cf. *Knowles,* 525 U.S., at 118, 119 S.Ct. 484. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

****1720** IV

The State does not seriously disagree with the Arizona Supreme Court's conclusion that Gant could not have accessed his vehicle at the time of the search, but it nevertheless asks us to uphold the search of his vehicle under the broad reading of *Belton* discussed above. The State argues that *Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle.

For several reasons, we reject the State's argument. First, the State seriously undervalues the privacy interests ***345** at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, see *New York v. Class,* 475 U.S. 106, 112–113, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986), the former interest is nevertheless important and deserving of constitutional protection, see *Knowles,* 525 U.S., at 117, 119 S.Ct. 484. It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.[5]

At the same time as it undervalues these privacy concerns, the State exaggerates the clarity that its reading of *Belton* provides. Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate ***346** to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton* 's purview[6] and whether a search is reasonable when it commences or continues after the arrestee ****1721** has been removed from the scene.[7] The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a "bright line." See 3 LaFave § 7.1(c), at 514–524.

Contrary to the State's suggestion, a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests. Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance,

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle ***347** to "gain immediate control of weapons." *Id.,* at 1049, 103 S.Ct. 3469 (citing *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross,* 456 U.S. 798, 820–821, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by Justice SCALIA's opinion concurring in the judgment in *Thornton,* which we conclude today are reasonable for purposes of the Fourth Amendment, *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. Cf. *Maryland v. Buie,* 494 U.S. 325, 334, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (holding that, incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding).

These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. For these reasons, we are unpersuaded by the State's arguments that a broad reading of *Belton* would meaningfully further law enforcement interests and justify a substantial intrusion on individuals' privacy.[8]

****1722** ***348** V

Our dissenting colleagues argue that the doctrine of *stare decisis* requires adherence to a broad reading of *Belton* even though the justifications for searching a vehicle incident to arrest are in most cases absent.[9] The doctrine of *stare decisis* is of course "essential to the respect accorded to the judgments of the Court and to the stability of the law," but it does not compel us to follow a past decision when its rationale no longer withstands "careful analysis." *Lawrence v. Texas,* 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice. And we would be particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it. The safety and evidentiary interests that supported the search in *Belton* simply are not present in this case. Indeed, it is hard to imagine two cases that are factually more distinct, as *Belton* involved one officer confronted by four unsecured arrestees suspected of committing a drug offense and this case involves several officers confronted with a securely detained arrestee apprehended for driving with a suspended license. This case is also distinguishable from *Thornton,* in which the petitioner was ***349** arrested for a drug offense. It is thus unsurprising that Members of this Court who concurred in the judgments in *Belton* and *Thornton* also concur in the decision in this case.[10]

We do not agree with the contention in Justice ALITO's dissent (hereinafter dissent) that consideration of police reliance interests requires a different result. Although it appears that the State's reading of *Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years,[11] many of these searches were not justified by the reasons underlying the *Chimel* exception. Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to ****1723** the security of their private effects violated as a result. The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence. Cf. *Mincey v. Arizona,* 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment"). The dissent's reference in this regard to the reliance interests cited in *Dickerson v. United States,* 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), is misplaced. See *post,* at 1728. In observing ***350** that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," 530 U.S., at 443, 120 S.Ct. 2326, the Court was referring not to police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right.

The dissent also ignores the checkered history of the search-incident-to-arrest exception. Police authority to search the place in which a lawful arrest is made was broadly asserted in *Marron v. United States,* 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927), and limited a few years later in *Go–Bart Importing Co. v. United States,* 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931), and *United States v. Lefkowitz,* 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932). The limiting views expressed in *Go–Bart* and *Lefkowitz* were in turn abandoned in *Harris v. United States,* 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947), which upheld a search of a four-room apartment incident to the occupant's arrest. Only a year later the Court in *Trupiano v. United States,* 334 U.S. 699, 708, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948), retreated from that holding, noting that the search-incident-to-arrest exception is "a strictly limited" one that must be justified by "something more in the way of necessity than merely a lawful arrest." And just two years after that, in *United States v. Rabinowitz,* 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), the Court again reversed course and upheld the search of an entire apartment. Finally, our opinion in *Chimel* overruled *Rabinowitz* and what remained of *Harris* and established the present boundaries of the search-incident-to-arrest exception. Notably, none of the dissenters in *Chimel* or the cases that preceded it argued that law enforcement reliance interests outweighed the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule.

The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely "within 'the area into which an arrestee might reach,' " ***351** 453 U.S., at 460, 101 S.Ct. 2860, and blind adherence to *Belton* 's faulty assumption would authorize myriad unconstitutional searches. The doctrine of *stare decisis* does not require us to approve routine constitutional violations.

VI

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will ****1724** be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed.

It is so ordered.

Justice SCALIA, concurring.

To determine what is an "unreasonable" search within the meaning of the Fourth Amendment, we look first to the historical practices the Framers sought to preserve; if those provide inadequate guidance, we apply traditional standards of reasonableness. See *Virginia v. Moore,* 553 U.S. 164, 168 – 171, 128 S.Ct. 1598, 1602–04, 170 L.Ed.2d 559 (2008). Since the historical scope of officers' authority to search vehicles incident to arrest is uncertain, see *Thornton v. United States,* 541 U.S. 615, 629–631, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (SCALIA, J., concurring in judgment), traditional standards of reasonableness govern. It is abundantly clear that those standards do not justify what I take to be the rule set forth in *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and *Thornton:* that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons. When an arrest is made in connection with a roadside stop, police virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually ***352** always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car.

Law enforcement officers face a risk of being shot whenever they pull a car over. But that risk is at its height at the time of the initial confrontation; and it is *not at all* reduced by allowing a search of the stopped vehicle after the driver has been arrested and placed in the squad car. I observed in *Thornton* that the Government had failed to provide a single instance in which a formerly restrained arrestee escaped to retrieve a weapon from his own vehicle, 541 U.S., at 626, 124 S.Ct. 2127; Arizona and its *amici* have not remedied that significant deficiency in the present case.

It must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested. Where no arrest is made, we have held that officers may search the car if they reasonably believe "the suspect is dangerous and ... may gain immediate control of weapons." *Michigan v. Long,* 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). In the no-arrest case, the possibility of access to weapons in the vehicle always

exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of *Michigan v. Long* is not at issue here.

Justice STEVENS acknowledges that an officer-safety rationale cannot justify all vehicle searches incident to arrest, but asserts that that is not the rule *Belton* and *Thornton* adopted. (As described above, I read those cases differently.) Justice STEVENS would therefore retain the application of *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), in the car-search context but would apply in the future what he believes our cases held in the past: that officers making a roadside stop may search the vehicle so long as the "arrestee is within reaching distance of the passenger compartment at the time of the search." *Ante,* at 1723. I believe that this ***353** standard fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene ****1725** unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search. In my view we should simply abandon the *Belton–Thornton* charade of officer safety and overrule those cases. I would hold that a vehicle search incident to arrest is *ipso facto* "reasonable" only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred. Because respondent was arrested for driving without a license (a crime for which no evidence could be expected to be found in the vehicle), I would hold in the present case that the search was unlawful.

Justice ALITO insists that the Court must demand a good reason for abandoning prior precedent. That is true enough, but it seems to me ample reason that the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results. See *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). We should recognize *Belton* 's fanciful reliance upon officer safety for what it was: "a return to the broader sort of [evidence-gathering] search incident to arrest that we allowed before *Chimel*." *Thornton, supra,* at 631, 124 S.Ct. 2127 (SCALIA, J., concurring in judgment).

Justice ALITO argues that there is no reason to adopt a rule limiting automobile-arrest searches to those cases where the search's object is evidence of the crime of arrest. *Post,* at 1731 (dissenting opinion). I disagree. This formulation of officers' authority both preserves the outcomes of our prior cases and tethers the scope and rationale of the doctrine to the triggering event. *Belton,* by contrast, allowed searches precisely when its exigency-based rationale was least applicable: The fact of the arrest in the automobile context makes searches on exigency grounds *less* reasonable, not more. I also disagree with Justice ALITO's conclusory ***354** assertion that this standard will be difficult to administer in practice, *post,* at 1729; the ease of its application in this case would suggest otherwise.

No other Justice, however, shares my view that application of *Chimel* in this context should be entirely abandoned. It seems to me unacceptable for the Court to come forth with a 4–to–1–to–4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice STEVENS. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.

Justice BREYER, dissenting.

I agree with Justice ALITO that *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), is best read as setting forth a bright-line rule that permits a warrantless search of the passenger compartment of an automobile incident to the lawful arrest of an occupant—regardless of the danger the arrested individual in fact poses. I also agree with Justice STEVENS, however, that the rule can produce results divorced from its underlying Fourth Amendment rationale. Compare *Belton, supra,* with *Chimel v. California,* 395 U.S. 752, 764, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (explaining that the rule allowing contemporaneous searches is justified by the need to prevent harm to a police officer or destruction of evidence of the crime). For that reason I would look ****1726** for a better rule—were the question before us one of first impression.

The matter, however, is not one of first impression, and that fact makes a substantial difference. The *Belton* rule has been followed not only by this Court in *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), but also by numerous other courts. Principles of *stare decisis* must apply, and ***355** those who wish this Court to change a well-established legal precedent—where, as here, there has been considerable reliance on the legal rule in question—bear a heavy burden. Cf. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 918 – 926, 127 S.Ct. 2705, 2719–21, 168 L.Ed.2d 623 (2007) (BREYER, J., dissenting). I have

not found that burden met. Nor do I believe that the other considerations ordinarily relevant when determining whether to overrule a case are satisfied. I consequently join Justice ALITO's dissenting opinion with the exception of Part II–E.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice KENNEDY join, and with whom Justice BREYER joins except as to Part II–E, dissenting.

Twenty-eight years ago, in *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (Footnote omitted.) Five years ago, in *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004)—a case involving a situation not materially distinguishable from the situation here—the Court not only reaffirmed but extended the holding of *Belton,* making it applicable to recent occupants. Today's decision effectively overrules those important decisions, even though respondent Gant has not asked us to do so.

To take the place of the overruled precedents, the Court adopts a new two-part rule under which a police officer who arrests a vehicle occupant or recent occupant may search the passenger compartment if (1) the arrestee is within reaching distance of the vehicle at the time of the search or (2) the officer has reason to believe that the vehicle contains evidence of the offense of arrest. *Ante,* at 1723 – 1724. The first part of this new rule may endanger arresting officers and is truly endorsed by only four Justices; Justice SCALIA joins solely for the purpose of avoiding a "4–to–1–to–4 opinion." ***356** *Ante,* at 1725 (concurring opinion). The second part of the new rule is taken from Justice SCALIA's separate opinion in *Thornton* without any independent explanation of its origin or justification and is virtually certain to confuse law enforcement officers and judges for some time to come. The Court's decision will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law, and although the Court purports to base its analysis on the landmark decision in *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the Court's reasoning undermines *Chimel*. I would follow *Belton,* and I therefore respectfully dissent.

I

Although the Court refuses to acknowledge that it is overruling *Belton* and *Thornton,* there can be no doubt that it does so.

In *Belton,* an officer on the New York Thruway removed the occupants from a car and placed them under arrest but did not handcuff them. See 453 U.S., at 456, 101 S.Ct. 2860; Brief for Petitioner in *New York v. Belton,* O.T.1980, No. 80–328, p. 3. The officer then searched a jacket on the ****1727** car's back seat and found drugs. 453 U.S., at 455, 101 S.Ct. 2860. By a divided vote, the New York Court of Appeals held that the search of the jacket violated *Chimel,* in which this Court held that an arresting officer may search the area within an arrestee's immediate control. See *State v. Belton,* 50 N.Y.2d 447, 429 N.Y.S.2d 574, 407 N.E.2d 420 (1980). The judges of the New York Court of Appeals disagreed on the factual question whether the *Belton* arrestees could have gained access to the car. The majority thought that they could not have done so, *id.,* at 452, n. 2, 429 N.Y.S.2d 574, 407 N.E.2d 420, 429 N.Y.S.2d 574, 407 N.E.2d, at 423, n. 2, but the dissent thought that this was a real possibility, *id.,* at 453, 429 N.Y.S.2d 574, 407 N.E.2d, at 424 (opinion of Gabrielli, J.).

Viewing this disagreement about the application of the *Chimel* rule as illustrative of a persistent and important problem, the *Belton* Court concluded that " '[a] single familiar ***357** standard' " was " 'essential to guide police officers' " who make roadside arrests. 453 U.S., at 458, 101 S.Ct. 2860 (quoting *Dunaway v. New York,* 442 U.S. 200, 213–214, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)). The Court acknowledged that articles in the passenger compartment of a car are not always within an arrestee's reach, but "[i]n order to establish the workable rule this category of cases requires," the Court adopted a rule that categorically permits the search of a car's passenger compartment incident to the lawful arrest of an occupant. 453 U.S., at 460, 101 S.Ct. 2860.

The precise holding in *Belton* could not be clearer. The Court stated unequivocally: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Ibid.* (footnote omitted).

Despite this explicit statement, the opinion of the Court in the present case curiously suggests that *Belton* may reasonably be read as adopting a holding that is narrower than the one explicitly set out in the *Belton* opinion, namely, that an

officer arresting a vehicle occupant may search the passenger compartment "*when* the passenger compartment is within an arrestee's reaching distance." *Ante,* at 1717 – 1718 (emphasis in original). According to the Court, the broader reading of *Belton* that has gained wide acceptance "may be attributable to Justice Brennan's dissent." *Ante,* at 1718.

Contrary to the Court's suggestion, however, Justice Brennan's *Belton* dissent did not mischaracterize the Court's holding in that case or cause that holding to be misinterpreted. As noted, the *Belton* Court explicitly stated precisely what it held. In *Thornton,* the Court recognized the scope of *Belton* 's holding. See 541 U.S., at 620, 124 S.Ct. 2127. So did Justice SCALIA's separate opinion. See *id.,* at 625, 124 S.Ct. 2127 (opinion concurring in judgment) ("In *[Belton]* we set forth a bright-line rule for arrests of automobile occupants, holding that ... a search of the whole [passenger] compartment is justified in every case"). So does Justice SCALIA's opinion in the present ***358** case. See *ante,* at 1724 (*Belton* and *Thornton* held that "arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons"). This "bright-line rule" has now been interred.

II

Because the Court has substantially overruled *Belton* and *Thornton,* the Court must explain why its departure from the usual rule of *stare decisis* is justified. I recognize that *stare decisis* is not an "inexorable command," ****1728** *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), and applies less rigidly in constitutional cases, *Glidden Co. v. Zdanok,* 370 U.S. 530, 543, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962) (plurality opinion). But the Court has said that a constitutional precedent should be followed unless there is a " 'special justification' " for its abandonment. *Dickerson v. United States,* 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). Relevant factors identified in prior cases include whether the precedent has engendered reliance, *id.,* at 442, 120 S.Ct. 2326, whether there has been an important change in circumstances in the outside world, *Randall v. Sorrell,* 548 U.S. 230, 244, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion); *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 412, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting), whether the precedent has proved to be unworkable, *Vieth v. Jubelirer,* 541 U.S. 267, 306, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion) (citing *Payne, supra,* at 827, 111 S.Ct. 2597), whether the precedent has been undermined by later decisions, see, *e.g., Patterson v. McLean Credit Union,* 491 U.S. 164, 173–174, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), and whether the decision was badly reasoned, *Vieth, supra,* at 306, 124 S.Ct. 1769 (plurality opinion). These factors weigh in favor of retaining the rule established in *Belton.*

A

Reliance. While reliance is most important in "cases involving property and contract rights," *Payne, supra,* at 828, 111 S.Ct. 2597, the Court has recognized that reliance by law enforcement officers is also entitled to weight. In *Dickerson,* the Court held that principles of *stare decisis* "weigh[ed]" heavily ***359** against overruling *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), because the *Miranda* rule had become "embedded in routine police practice." 530 U.S., at 443, 120 S.Ct. 2326.

If there was reliance in *Dickerson,* there certainly is substantial reliance here. The *Belton* rule has been taught to police officers for more than a quarter century. Many searches —almost certainly including more than a few that figure in cases now on appeal—were conducted in scrupulous reliance on that precedent. It is likely that, on the very day when this opinion is announced, numerous vehicle searches will be conducted in good faith by police officers who were taught the *Belton* rule.

The opinion of the Court recognizes that "*Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years." *Ante,* at 1722 – 1723. But for the Court, this seemingly counts for nothing. The Court states that "[w]e have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice," *ante,* at 1722, but of course the Court routinely relies on decisions sustaining the constitutionality of police practices without doing what the Court has done here—*sua sponte* considering whether those decisions should be overruled. And the Court cites no authority for the proposition that *stare decisis* may be disregarded or provides only lesser protection when the precedent that is challenged is one that sustained the constitutionality of a law enforcement practice.

The Court also errs in arguing that the reliance interest that was given heavy weight in *Dickerson* was not "police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right."

Ante, at 1723. The *Dickerson* opinion makes no reference to "societal reliance," and petitioner in that case contended that there had been reliance on *Miranda* because, ****1729** among other things, "[f]or nearly thirty-five years, *Miranda* 's requirements ha[d] shaped law enforcement training [and] police ***360** conduct." See Brief for Petitioner in *Dickerson v. United States,* O.T.1999, No. 99–5525, p. 33.

B

Changed circumstances. Abandonment of the *Belton* rule cannot be justified on the ground that the dangers surrounding the arrest of a vehicle occupant are different today than they were 28 years ago. The Court claims that "[w]e now know that articles inside the passenger compartment are rarely 'within "the area into which an arrestee might reach," ' " *ante,* at 1723 – 1724, but surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence.

C

Workability. The *Belton* rule has not proved to be unworkable. On the contrary, the rule was adopted for the express purpose of providing a test that would be relatively easy for police officers and judges to apply. The Court correctly notes that even the *Belton* rule is not perfectly clear in all situations. Specifically, it is sometimes debatable whether a search is or is not contemporaneous with an arrest, *ante,* at 1720, but that problem is small in comparison with the problems that the Court's new two-part rule will produce.

The first part of the Court's new rule—which permits the search of a vehicle's passenger compartment if it is within an arrestee's reach at the time of the search—reintroduces the same sort of case-by-case, fact-specific decisionmaking that the *Belton* rule was adopted to avoid. As the situation in *Belton* illustrated, there are cases in which it is unclear whether an arrestee could retrieve a weapon or evidence in the passenger compartment of a car.

Even more serious problems will also result from the second part of the Court's new rule, which requires officers ***361** making roadside arrests to determine whether there is reason to believe that the vehicle contains evidence of the crime of arrest. What this rule permits in a variety of situations is entirely unclear.

D

Consistency with later cases. The *Belton* bright-line rule has not been undermined by subsequent cases. On the contrary, that rule was reaffirmed and extended just five years ago in *Thornton.*

E

Bad reasoning. The Court is harshly critical of *Belton* 's reasoning, but the problem that the Court perceives cannot be remedied simply by overruling *Belton. Belton* represented only a modest—and quite defensible—extension of *Chimel,* as I understand that decision.

Prior to *Chimel,* the Court's precedents permitted an arresting officer to search the area within an arrestee's "possession" and "control" for the purpose of gathering evidence. See 395 U.S., at 759–760, 89 S.Ct. 2034. Based on this "abstract doctrine," *id*., at 760, n. 4, 89 S.Ct. 2034, the Court had sustained searches that extended far beyond an arrestee's grabbing area. See *United States v. Rabinowitz,* 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950) (search of entire office); *Harris v. United States,* 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947) (search of entire apartment).

****1730** The *Chimel* Court, in an opinion written by Justice Stewart, overruled these cases. Concluding that there are only two justifications for a warrantless search incident to arrest —officer safety and the preservation of evidence—the Court stated that such a search must be confined to "the arrestee's person" and "the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S., at 762–763, 89 S.Ct. 2034.

Unfortunately, *Chimel* did not say whether "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence" is to be measured at the time of ***362** the arrest or at the time of the search, but unless the *Chimel* rule was meant to be a specialty rule, applicable to only a few unusual cases, the Court must have intended for this area to be measured at the time of arrest.

This is so because the Court can hardly have failed to appreciate the following two facts. First, in the great majority of cases, an officer making an arrest is able to handcuff the arrestee and remove him to a secure place before conducting a search incident to the arrest. See *ante,* at 1719, n. 4 (stating that it is "the rare case" in which an arresting officer cannot secure an arrestee before conducting a search). Second, because it is safer for an arresting officer to secure an arrestee before searching, it is likely that this is what arresting officers do in the great majority of cases. (And it appears, not surprisingly, that this is in fact the prevailing practice.[1]) Thus, if the area within an arrestee's reach were assessed, not at the time of arrest, but at the time of the search, the *Chimel* rule would rarely come into play.

Moreover, if the applicability of the *Chimel* rule turned on whether an arresting officer chooses to secure an arrestee prior to conducting a search, rather than searching first and securing the arrestee later, the rule would "create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer." *United States v. Abdul–Saboor,* 85 F.3d 664, 669 (C.A.D.C.1996). If this is the law, the D.C. Circuit observed, "the law would truly be, as Mr. Bumble said, 'a ass.' " *Ibid*. See also *United States v. Tejada,* 524 F.3d 809, 812 (C.A.7 2008) ("[I]f the police could lawfully have searched the defendant's grabbing radius at the moment of arrest, he has no legitimate complaint if, the better to protect themselves from him, they first put him outside that radius").

I do not think that this is what the *Chimel* Court intended. Handcuffs were in use in 1969. The ability of arresting officers ***363** to secure arrestees before conducting a search —and their incentive to do so—are facts that can hardly have escaped the Court's attention. I therefore believe that the *Chimel* Court intended that its new rule apply in cases in which the arrestee is handcuffed before the search is conducted.

The *Belton* Court, in my view, proceeded on the basis of this interpretation of *Chimel*. Again speaking through Justice Stewart, the *Belton* Court reasoned that articles in the passenger compartment of a car are "generally, even if not inevitably," within an arrestee's reach. 453 U.S., at 460, 101 S.Ct. 2860. This is undoubtedly true at the time of the arrest of a person who is seated in a car but plainly not true when the person has been removed from the car and placed in handcuffs. Accordingly, the *Belton* Court must have proceeded ****1731** on the assumption that the *Chimel* rule was to be applied at the time of arrest. And that is why the *Belton* Court was able to say that its decision "in no way alter[ed] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S., at 460, n. 3, 101 S.Ct. 2860. Viewing *Chimel* as having focused on the time of arrest, *Belton* 's only new step was to eliminate the need to decide on a case-by-case basis whether a particular person seated in a car actually could have reached the part of the passenger compartment where a weapon or evidence was hidden. For this reason, if we are going to reexamine *Belton,* we should also reexamine the reasoning in *Chimel* on which *Belton* rests.

F

The Court, however, does not reexamine *Chimel* and thus leaves the law relating to searches incident to arrest in a confused and unstable state. The first part of the Court's new two-part rule—which permits an arresting officer to search the area within an arrestee's reach at the time of the search—applies, at least for now, only to vehicle occupants ***364** and recent occupants, but there is no logical reason why the same rule should not apply to all arrestees.

The second part of the Court's new rule, which the Court takes uncritically from Justice SCALIA's separate opinion in *Thornton,* raises doctrinal and practical problems that the Court makes no effort to address. Why, for example, is the standard for this type of evidence-gathering search "reason to believe" rather than probable cause? And why is this type of search restricted to evidence of the offense of arrest? It is true that an arrestee's vehicle is probably more likely to contain evidence of the crime of arrest than of some other crime, but if reason-to-believe is the governing standard for an evidence-gathering search incident to arrest, it is not easy to see why an officer should not be able to search when the officer has reason to believe that the vehicle in question possesses evidence of a crime other than the crime of arrest.

Nor is it easy to see why an evidence-gathering search incident to arrest should be restricted to the passenger compartment. The *Belton* rule was limited in this way because the passenger compartment was considered to be the area that vehicle occupants can generally reach, 453 U.S., at 460, 101 S.Ct. 2860, but since the second part of the new rule is not based on officer safety or the preservation of evidence, the ground for this limitation is obscure.[2]

***365** III

Respondent in this case has not asked us to overrule *Belton,* much less *Chimel*. Respondent's argument rests entirely on an interpretation of *Belton* that is plainly incorrect, an interpretation that disregards *Belton* 's explicit delineation of its holding. I would therefore leave any reexamination of our prior precedents for another day, if such a reexamination is to be undertaken ****1732** at all. In this case, I would simply apply *Belton* and reverse the judgment below.

All Citations

556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485, 77 USLW 4285, 09 Cal. Daily Op. Serv. 4732, 2009 Daily Journal D.A.R. 5611, 21 Fla. L. Weekly Fed. S 781, 47 A.L.R. Fed. 2d 657

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The officer was unable to handcuff the occupants because he had only one set of handcuffs. See Brief for Petitioner in *New York v. Belton,* O.T.1980, No. 80–328, p. 3 (hereinafter Brief in No. 80–328).

2 Compare *United States v. Green,* 324 F.3d 375, 379 (C.A.5 2003) (holding that *Belton* did not authorize a search of an arrestee's vehicle when he was handcuffed and lying facedown on the ground surrounded by four police officers 6–to–10 feet from the vehicle), *United States v. Edwards,* 242 F.3d 928, 938 (C.A.10 2001) (finding unauthorized a vehicle search conducted while the arrestee was handcuffed in the back of a patrol car), and *United States v. Vasey,* 834 F.2d 782, 787 (C.A.9 1987) (finding unauthorized a vehicle search conducted 30–to–45 minutes after an arrest and after the arrestee had been handcuffed and secured in the back of a police car), with *United States v. Hrasky,* 453 F.3d 1099, 1102 (C.A.8 2006) (upholding a search conducted an hour after the arrestee was apprehended and after he had been handcuffed and placed in the back of a patrol car), *United States v. Weaver,* 433 F.3d 1104, 1106 (C.A.9 2006) (upholding a search conducted 10–to–15 minutes after an arrest and after the arrestee had been handcuffed and secured in the back of a patrol car), and *United States v. White,* 871 F.2d 41, 44 (C.A.6 1989) (upholding a search conducted after the arrestee had been handcuffed and secured in the back of a police cruiser).

3 The practice of searching vehicles incident to arrest after the arrestee has been handcuffed and secured in a patrol car has not abated since we decided *Thornton*. See, *e.g., United States v. Murphy,* 221 Fed.Appx. 715, 717 (C.A.10 2007); *Hrasky,* 453 F.3d, at 1100; *Weaver,* 433 F.3d, at 1105; *United States v. Williams,* 170 Fed.Appx. 399, 401 (C.A.6 2006); *United States v. Dorsey,* 418 F.3d 1038, 1041 (C.A.9 2005); *United States v. Osife,* 398 F.3d 1143, 1144 (C.A.9 2005); *United States v. Sumrall,* 115 Fed.Appx. 22, 24 (C.A.10 2004).

4 Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains. Cf. 3 W. LaFave, Search and Seizure § 7.1(c), p. 525 (4th ed.2004) (hereinafter LaFave) (noting that the availability of protective measures "ensur[es] the nonexistence of circumstances in which the arrestee's 'control' of the car is in doubt"). But in such a case a search incident to arrest is reasonable under the Fourth Amendment.

5 See *Maryland v. Garrison,* 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987); *Chimel v. California,* 395 U.S. 752, 760–761, 89 S.Ct. 2034 (1969); *Stanford v. Texas,* 379 U.S. 476, 480–484, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Weeks v. United States,* 232 U.S. 383, 389–392, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Boyd v. United States,* 116 U.S. 616, 624–625, 6 S.Ct. 524, 29 L.Ed. 746 (1886); see also 10 C. Adams, The Works of John Adams 247–248 (1856). Many have observed that a broad reading of *Belton* gives police limitless discretion to conduct exploratory searches. See 3 LaFave § 7.1(c), at 527 (observing that *Belton* creates the risk "that police will make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits"); see also *United States v. McLaughlin,* 170 F.3d 889, 894 (C.A.9 1999) (Trott, J., concurring) (observing that *Belton* has been applied to condone "purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find"); *State v. Pallone,* 2001 WI 77, ¶¶ 87–90, 236 Wis.2d

162, 203–204, and n. 9, 613 N.W.2d 568, 588, and n. 9 (2000) (Abrahamson, C.J., dissenting) (same); *State v. Pierce,* 136 N.J. 184, 211, 642 A.2d 947, 961 (1994) (same).

6 Compare *United States v. Caseres,* 533 F.3d 1064, 1072 (C.A.9 2008) (declining to apply *Belton* when the arrestee was approached by police after he had exited his vehicle and reached his residence), with *Rainey v. Commonwealth,* 197 S.W.3d 89, 94–95 (Ky.2006) (applying *Belton* when the arrestee was apprehended 50 feet from the vehicle), and *Black v. State,* 810 N.E.2d 713, 716 (Ind.2004) (applying *Belton* when the arrestee was apprehended inside an auto repair shop and the vehicle was parked outside).

7 Compare *McLaughlin,* 170 F.3d, at 890–891 (upholding a search that commenced five minutes after the arrestee was removed from the scene), *United States v. Snook,* 88 F.3d 605, 608 (C.A.8 1996) (same), and *United States v. Doward,* 41 F.3d 789, 793 (C.A.1 1994) (upholding a search that continued after the arrestee was removed from the scene), with *United States v. Lugo,* 978 F.2d 631, 634 (C.A.10 1992) (holding invalid a search that commenced after the arrestee was removed from the scene), and *State v. Badgett,* 200 Conn. 412, 427–428, 512 A.2d 160, 169 (1986) (holding invalid a search that continued after the arrestee was removed from the scene).

8 At least eight States have reached the same conclusion. Vermont, New Jersey, New Mexico, Nevada, Pennsylvania, New York, Oregon, and Wyoming have declined to follow a broad reading of *Belton* under their state constitutions. See *State v. Bauder,* 181 Vt. 392, 401, 924 A.2d 38, 46–47 (2007); *State v. Eckel,* 185 N.J. 523, 540, 888 A.2d 1266, 1277 (2006); *Camacho v. State,* 119 Nev. 395, 399–400, 75 P.3d 370, 373–374 (2003); *Vasquez v. State,* 990 P.2d 476, 488–489 (Wyo.1999); *State v. Arredondo,* 123 N.M. 628, 636, 944 P.2d 276, 1997–NMCA–081 (Ct.App.), overruled on other grounds by *State v. Steinzig,* 127 N.M. 752, 987 P.2d 409, 1999–NMCA–107 (Ct.App.); *Commonwealth v. White,* 543 Pa. 45, 57, 669 A.2d 896, 902 (1995); *People v. Blasich,* 73 N.Y.2d 673, 678, 543 N.Y.S.2d 40, 541 N.E.2d 40, 43 (1989); *State v. Fesler,* 68 Or.App. 609, 612, 685 P.2d 1014, 1016–1017 (1984). And a Massachusetts statute provides that a search incident to arrest may be made only for the purposes of seizing weapons or evidence of the offense of arrest. See *Commonwealth v. Toole,* 389 Mass. 159, 161–162, 448 N.E.2d 1264, 1266–1267 (1983) (citing Mass. Gen. Laws, ch. 276, § 1 (West 2006)).

9 Justice ALITO's dissenting opinion also accuses us of "overrul [ing]" *Belton* and *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), "even though respondent Gant has not asked us to do so." *Post,* at 1726. Contrary to that claim, the narrow reading of *Belton* we adopt today is precisely the result Gant has urged. That Justice ALITO has chosen to describe this decision as overruling our earlier cases does not change the fact that the resulting rule of law is the one advocated by respondent.

10 Justice STEVENS concurred in the judgment in *Belton,* 453 U.S., at 463, 101 S.Ct. 2860, for the reasons stated in his dissenting opinion in *Robbins v. California,* 453 U.S. 420, 444, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), Justice THOMAS joined the Court's opinion in *Thornton,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905, and Justice SCALIA and Justice GINSBURG concurred in the judgment in that case, *id.,* at 625, 124 S.Ct. 2127.

11 Because a broad reading of *Belton* has been widely accepted, the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding.

1 See Moskovitz, A Rule in Search of a Reason: An Empirical Reexamination of *Chimel* and *Belton,* 2002 Wis. L.Rev. 657, 665.

2 I do not understand the Court's decision to reach the following situations. First, it is not uncommon for an officer to arrest some but not all of the occupants of a vehicle. The Court's decision in this case does not address the question whether in such a situation a search of the passenger compartment may be justified on the ground that the occupants who are not arrested could gain access to the car and retrieve a weapon or destroy evidence. Second, there may be situations in which an arresting officer has cause to fear that persons who were not passengers in the car might attempt to retrieve a weapon or evidence from the car while the officer is still on the scene. The decision in this case, as I understand it, does not address that situation either.

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138 S.Ct. 54
Supreme Court of the United States

Terrence BYRD, petitioner,

v.

UNITED STATES.

No. 16–1371.
|
Sept. 28, 2017.

Synopsis
Case below, 679 Fed.Appx. 146.

Opinion
Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted.

All Citations

138 S.Ct. 54 (Mem), 198 L.Ed.2d 780, 86 USLW 3125, 86 USLW 3147

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45 S.Ct. 280
Supreme Court of the United States.

CARROLL et al.

v.

UNITED STATES.

No. 15.
|
Reargued and Submitted March 14, 1924.
|
Decided March 2, 1925.

Synopsis

Error to the District Court of the United States for the Western District of Michigan.

George Carroll and John Kiro were convicted of transporting intoxicating liquor, and they bring error. Affirmed.

This is a writ of error to the District Court under section 238 of the Judicial Code (Comp. St. § 1215). The plaintiffs in error, hereafter to be called the defendants, George Carroll and John Kiro, were indicted and convicted for transporting in an automobile intoxicating spirituous liquor, to wit, 68 quarts of socalled bonded whisky and gin, in violation of the National Prohibition Act (Comp. St. Ann. Supp. 1923, § 10138 ¼ et seq.). The ground on which they assail the conviction is that the trial court admitted in evidence two of the 68 bottles, one of whisky and one of gin, found by searching the automobile. It is contended that the search and seizure were in violation of the Fourth Amendment, and therefore that use of the liquor as evidence was not proper. Before the trial a motion was made by the defendants that all the liquor seized be returned to the defendant Carroll, who owned the automobile. This motion was denied.

The search and seizure were made by Cronenwett, Scully, and Thayer, federal prohibition agents, and one Peterson, a state officer, in December, 1921, as the car was going westward on the highway between Detroit and Grand Rapids at a point 16 miles outside of Grand Rapids. The facts leading to the search and seizure were as follows: On September 29th, Cronenwett and Scully were in an apartment in Grand Rapids. Three men came to that apartment, a man named Kurska, and the two defendants, Carroll and Kiro. Cronenwett was introduced to them as one Stafford working in the Michigan Chair Company in Grand Rapids, who wished to buy three cases of whisky. The price was fixed at $130 a case. The three men said they had to go to the east end of Grand Rapids to get the liquor and that they would be back in half or three-quarters of an hour. They went away, and in a short time Kruska came back and said they could not get it that night, that the man who had it was not in, but that they would deliver it the next day. They had come to the apartment in an automobile known as an Oldsmobile roadster, the number of which Cronenwett then identified, as did Scully. The proposed vendors did not return the next day, and the evidence disclosed no explanation of their failure to do so. One may surmise that it was suspicion of the real character of the proposed purchaser, whom Carroll subsequently called by his first name when arrested in December following. Cronenwett and his subordinates were engaged in patrolling the road leading from Detroit to Grand Rapids, looking for violations of the Prohibition Act. This seems to have been their regular tour of duty. On the 6th of October, Carroll and Kiro going eastward from Grand Rapids in the same Oldsmobile roadster, passed Cronenwett and Scully some distance out from Grand Rapids. Cronenwett called to Scully, who was taking lunch, that the Carroll boys had passed them going toward Detroit, and sought with Scully to catch up with them to see where they were going. The officers followed as far as East Lansing, half way to Detroit, but there lost trace of them. On the 15th of December, some two months later, Scully and Cronenwett, on their regular tour of duty with Peterson, the state officer, were going from Grand Rapids to Ionia, on the road to Detroit, when Kiro and Carroll met and passed them in the same automobile, coming from the direction of Detroit to Grand Rapids. The government agents turned their car and followed the defendants to a point some 16 miles east of Grand Rapids, where they stopped them and searched the car. They found behind the upholstering of the seats, the filling of which had been removed, 68 bottles. These had labels on them, part purporting to be certificates of English chemists that the contents were blended Scotch whiskies, and the rest that the contents were Gordon gin made in London. When an expert witness was called to prove the contents, defendants admitted the nature of them to be whisky and gin. When the defendants were arrested, carroll said to Cronenwett, ‘Take the liquor and give us one more chance, and I will make it right with you,’ and he pulled out a roll of bills, of which one was for $10. Peterson and another took the two defendants and the liquor and the car to Grand Rapids, while Cronenwett, Thayer, and Scully remained on the road looking for other cars, of whose coming they had information. The officers were not anticipating that the defendants would be coming through on

the highway at that particular time, but when they met them there they believed they were carrying liquor, and hence the search, seizure, and arrest.

Attorneys and Law Firms

****281** ***136** Messrs. Thomas E. Atkinson and Clare J. Hall, both of Grand Rapids, Mich., for plaintiffs in error.

***143** The Attorney General and Mr. James M. Beck, Sol. Gen., of Washington, D. C., for the United States.

Opinion

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The constitutional and statutory provisions involved in this case include the Fourth Amendment and the National Prohibition Act.

The Fourth Amendment is in part as follows:
'The right of the people to be secure in their persons, houses, papers and effects ****282** 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.'

Section 25, title 2, of the National Prohibition Act, c. 85, 41 Stat. 305, 315, passed to enforce the Eighteenth Amendment, makes it unlawful to have or possess any liquor intended for use in violating the act, or which has been so used, and provides that no property rights shall exist in such inquor. A search warrant may issue and such liquor, with the containers thereof, may be seized under the warrant and be ultimately destroyed. The section further provides:
'No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boaring house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as ***144** a residence in an apartment house, hotel, or boarding house.'

Section 26, title 2, under which the seizure herein was made, provides in part as follows:

'When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.'

The section then provides that the court upon conviction of the person so arrested shall order the liquor destroyed, and except for good cause shown shall order a sale by public auction of the other property seized, and that the proceeds shall be paid into the Treasury of the United States.

By section 6 of an act supplemental to the National Prohibition Act (42 Stat. 222, 223, c. 134 [Comp. St. Ann. Supp. 1923, § 10184a]) it is provided that if any officer or agent or employee of the United States engaged in the enforcement of the Prohibition Act or this Amendment, 'shall search any private dwelling,' as defined in that act, 'without a warrant directing such search,' or 'shall without a search warrant maliciously and without reasonable cause search any other building or property,' he shall be guilty of a misdemeanor and subject to fine or imprisonment or both.

In the passage of the supplemental act through the Senate, amendment No. 32, known as the Stanley Amendment, was adopted, the relevant part of which was as follows:
'Sec. 6. That any officer, agent or employee of the United States engaged in the enforcement of this act or ***145** the National Prohibition Act, or any other law of the United States, who shall search or attempt to search the property or premises of any person without previously securing a search warrant, as provided by law, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed $1,000, or imprisoned not to exceed one year, or both so fined and imprisoned in the discretion of the court.'

This amendment was objected to in the House, and the judiciary committee, to whom it was referred, reported to the House of Representatives the following as a substitute:
'Sec. 6. That no officer, agent or employee of the United States, while engaged in the enforcement of this act, the National Prohibition Act, or any law in reference to the manufacture or taxation of, or traffic in, intoxicating liquor,

shall search any private dwelling without a warrant directing such search, and no such warrant shall issue unless there is reason to believe such dwelling is used as a place in which liquor is manufactured for sale or sold. The term 'private dwelling' shall be construed to include the room or rooms occupied not transiently, but solely as a residence in an apartment house, hotel, or boarding house. Any violation of any provision of this paragraph shall be punished by a fine of not to exceed $1,000 or imprisonment not to exceed one year, or both such fine and imprisonment, in the discretion of the court.'

In its report the committee spoke in part as follows:
'It appeared to the committee that the effect of the Senate amendment No. 32, if agreed to by the House, would greatly cripple the enforcement of the National Prohibition Act and would otherwise seriously interfere with the government in the enforcement of many other laws, as its scope is not limited to the prohibition law, ***146** but applies equally to all laws where prompt action is necessary. There are on the statute books of the United States a number of laws authorizing search without a search warrant. Under the common law and agreeable to the Constitution search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search. This provision in regard to search is as a rule contained in the various state Constitutions, but notwithstanding that fact search without a warrant is permitted in many cases, and especially is that true in the enforcement of liquor legislation.

'The Senate amendment prohibits all search or attempt to search any property or premises without a search warrant. The effect of that would necessarily be to prohibit all search, as no search can take place if it is not on some property or premises.

'Not only does this amendment prohibit ****283** search of any lands but it prohibits the search of all property. It will prevent the search of the common bootlegger and his stock in trade, though caught and arrested in the act of violating the law. But what is perhaps more serious, it will make it impossible to stop the rum-running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they cannot search for liquor without a warrant they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of.'

The conference report resulted, so far as the difference between the two houses was concerned, in providing for the punishment of any officer, agent, or employee of the government who searches a 'private dwelling' without a warrant, and for the punishment of any such officer, ***147** etc., who searches any 'other building or property' where, and only where, he makes the search without a warrant 'maliciously and without probable cause.' In other words, it left the way open for searching an automobile or vehicle of transportation without a warrant, if the search was not malicious or without probable cause.

The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is, The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

The leading case on the subject of search and seizure is Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746. An Act of Congress of June 22, 1874 (18 Stat. 187), authorized a court of the United States in revenue cases, on motion of the government attorney, to require the defendant to produce in court his private books, invoices, and papers on pain in case of refusal of having the allegations of the attorney in his motion taken as confessed. This was held to be unconstitutional and void as applied to suits for penalties or to establish a forfeiture of goods, on the ground that under the Fourth Amendment the compulsory production of invoices to furnish evidence for forfeiture of goods constituted an unreasonable search even where made upon a search warrant, and was also a violation of the Fifth Amendment, in that it compelled the defendant in a criminal case to produce evidence against himself or be in the attitude of confessing his guilt.

In Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, it was held that a court in a criminal prosecution could not retain letters of the accused seized in his house, in his absence and without his authority, by a United States marshal ***148** holding no warrant for his arrest and none for the search of his premises, to be used as evidence against him, the accused having made timely application to the court for an order for the return of the letters.

In Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, a writ of error was brought to reverse a judgment of contempt of the District Court, fining the company and imprisoning one Silverthorne, its president, until he should purge himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the company and Silverthorne. Silverthorne had been arrested, and while under arrest the marshal had gone to the office of the company without a warrant and made a clean sweep of all books, papers, and documents found there and had taken copies and photographs of the papers. The District Court ordered the return of the originals, but impounded the photographs and copies. This was held to be an unreasonable search of the property and possessions of the corporation and a violation of the Fourth Amendment and the judgment for contempt was reversed.

In Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, the obtaining through stealth by a representative of the government from the office of one suspected of defrauding the government of a paper which had no pecuniary value in itself, but was only to be used as evidence against its owner, was held to be a violation of the Fourth Amendment. It was further held that when the paper was offered in evidence and duly objected to it must be ruled inadmissible because obtained through an unreasonable search and seizure and also in violation of the Fifth Amendment because working compulsory incrimination.

In Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654, it was held that where concealed liquor was found by government officers without a search warrant in the home of the defendant, ***149** in his absence, and after a demand made upon his wife, it was inadmissible as evidence against the defendant, because acquired by an unreasonable seizure.

In none of the cases cited is there any ruling as to the validity under the Fourth Amendment of a seizure without a warrant of contraband goods in the course of transportation and subject to forfeiture or destruction.

On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that ****284** is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

In Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, as already said, the decision did not turn on whether a reasonable search might be made without a warrant; but for the purpose of showing the principle on which the Fourth Amendment proceeds, and to avoid any misapprehension of what was decided, the court, speaking through Mr. Justice Bradley, used language which is of particular significance and applicability here. It was there said (page 623 [6 S. Ct. 528]): 'The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the ***150** common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duites, the Act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. Common-welath v. Dana, 2 Metc. (Mass.) 329. Many other things of this character might be enumerated.'

It is noteworthy that the twenty-fourth section of the act of 1789 to which the court there refers provides:

'That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any ***151** particular dwelling house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the daytime only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.' 1 Stat. 43.

Like provisions were contained in the Act of August 4, 1790, c. 35, §§ 48–51, 1 Stat. 145, 170; in section 27 of the Act of February 18, 1793, c. 8, 1 Stat. 305, 315; and in sections 68–71 of the Act of March 2, 1799, c. 22, 1 Stat. 627, 677, 678.

Thus contemporaneously with the adoption of the Fourth Amendment we find in the First Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant. Compare Hester v. United States, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898.

Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers, not only to board and search vessels within their own and adjoining districts, but also to stop, search, and examine any vehicle, beast, or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same, and the vehicle or beast as well, for trial ***152** and forfeiture. This act was renewed April 27, 1816 (3 Stat. 315), for a year and expired. The Act of February 28, 1865, revived section 2 of the Act of 1815, above described, 13 Stat. 441, c. 67. The substance of this section was re-enacted in the third section of the Act of July 18, 1866, c. 201, 14 Stat. 178, and was thereafter embodied in the Revised Statutes as section 3061 (Comp. St. § 5763). Neither section 3061 nor any of its earlier counterparts has ever been attacked as unconstitutional. ****285** Indeed, that section was referred to and treated as operative by this court in Cotzhausen v. Nazro, 107 U. S. 215, 219, 2 S. Ct. 503, 27 L. Ed. 540. See, also, United States v. One Black Horse (D C.) 129 F. 167.

Again by section 2140 of the Revised Statutes (Comp. St. § 4141) any Indian agent, subagent or commander of a military post in the Indian country, having reason to suspect or being informed that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of law, may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched and if any liquor is found therein, then it, together with the vehicles, shall be seized and and proceeded against by libel in the proper court and forfeited. Section 2140 was the outgrowth of the Act of May 6, 1822, c. 58, 3 Stat. 682, authorizing Indian agents to cause the goods of traders in the Indian country to be searched upon suspicion or information that ardent spirits were being introduced into the Indian country to be seized and forfeited if found, and of the Act of June 30, 1834, § 20, c. 161, 4 Stat. 729, 732, enabling an Indian agent having reason to suspect any person of having introduced or being about to introduce liquors into the Indian country to cause the boat, stores or places of deposit of such person to be searched and the liquor found forfeited. This court recognized the statute of 1822 as justifying such a search and seizure in American Fur Co. v. United States, 2 Pet. 358, 7 L. Ed. 450. By the Indian ***153** Appropriation Act of March 2, 1917, c. 146, 39 Stat. 969, 970, automobiles used in introducing or attempting to introduce intoxicants into the Indian territory may be seized, libeled, and forfeited as provided in the Revised Statutes, § 2140.

And again in Alaska, by section 174 of the Act of March 3, 1899, c. 429, 30 Stat. 1253, 1280, it is provided that collectors and deputy collectors or any person authorized by them in writing shall be given power to arrest persons and seize vessels and merchandise in Alaska liable to fine, penalties, or forfeiture under the act and to keep and deliver the same, and the Attorney General, in construing the act, advised the government:

'If your agents reasonably suspect that a violation of law has occurred, in my opinion they have power to search any vessel within the three-mile limit according to the practice of customs officers when acting under section 3059 of the Revised Statutes [Comp. St. § 5761], and to seize such vessels.' 26 Op. Attys. Gen. 243.

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable ***154** if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. Section 26, title 2, of the National Prohibition Act, like the second section of the act of 1789, for the searching of vessels, like the provisions of the act of 1815, and section 3601, Revised Statutes, for searching vehicles for smuggled goods, and like the act of 1822, and that of 1834 and section 2140, R. S., and the act of 1917 for the search of vehicles and automobiles for liquor smuggled into the Indian country, was enacted primarily to accomplish the seizure and destruction of contraband goods; secondly, the automobile was to be forfeited; and, thirdly, the driver was to be arrested. Under section 29, title 2, of the act the latter might be punished by not more than $500 fine for the first offense, not more than $1,000 fine and 90 days' imprisonment for the second offense, and by a fine of $500 or more and by not more than 2 years' imprisonment for the third offense. Thus he is to be arrested for a misdemeanor for his first and second offenses, and for a felony if he offends the third time.

The main purpose of the act obviously was to deal with the liquor and its transportation, and to destroy it. The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the for ***155** bidden product can be distributed for illegal sale and ****286** use. Section 26 was intended to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental. The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected. Under section 28, title 2, of the Prohibition Act, the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under section 26 of the Prohibition Act are therefore protected by section 970 of the Revised Statutes (Comp. St. § 1611), providing that:
'When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: Provided, that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent.'

It follows from this that, if an officer seizes an autombile or the liquor in it without a warrant, and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure. Stacey v. Emery, 97 U. S. 642, 24 L. Ed. 1035. The measure of legality of such a seizure is, ***156** therefore, that the seizing officer shall have reasonable or probable cause for believing that the antomobile which he stops and seizes has contraband liquor therein which is being illegally transported.

We here find the line of distrinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under section 26, in absence of probable cause, a right to have restored to him the automobile, it

protects him under the Weeks and Amos Cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them.

Such a rule fulfills the guaranty of the Fourth Amendment. In cases where the securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. United States v. Kaplan (D. C.) 286 F. 963, 972.

But we are pressed with the argument that if the search of the automobile discloses the presence of liquor and leads under the staute to the arrest of the person in charge of the automobile, the right of seizure should be limited by the common-law rule as to the circumstances justifying an arrest without a warrant for a misdemeanor. The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed ***157** in his presence. Kurtz v. Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. Ed. 458; John Bad Elk v. United States, 177 U. S. 529, 20 S. Ct. 729, 44 L. Ed. 874. The rule is sometimes expressed as follows:

'In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.' Halsbury's Laws of England, vol. 9, part. III, 612.

The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace (1 Stephen, History of Criminal Law, 193), while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant (Rohan v. Sawin, 5 Cush. [Mass.] 281). The argument for defendants is that, as the misdemeanor to justify arrest without warrant must be committed in the presence of the police officer, the offense is not committed in his presence unless he can by his senses detect that the liquor is being transported, no matter how reliable his previous information by which he can identify the automobile as loaded with it. Elrod v. Moss (C. C. A.) 278 F. 123; Hughes v. State, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639.

So it is that under the rule contended for by defendants the liquor if carried by one who has been already twice convicted of the same offense may be seized on information other than the senses, while if he has been only once convicted it may not be seized unless the presence of the liquor is detected ****287** by the senses as the automobile concealing it rushes by. This is certainly a very unsatisfactory line of difference when the main object of the section is to forfeit and suppress the liquor, the arrest of the individual being only incidental as shown by the lightness ***158** of the penalty. See Commonwealth v. Street, 3 Pa. Dist. and Co. Ct. Rep.783. In England at the common law the difference in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors. As the main purpose of section 26 was seizure and forfeiture, it is not so much the owner as the property that offends. Agnew v. Haymes, 141 F. 631, 641, 72 C. C. A. 325. The language of the section provides for seizure when the officer of the law 'discovers' any one in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears or smells as the automobile rolls by and excludes therefrom when he identifies the car the convincing information that he may previously have received as to the use being made of it.

We do not think such a nice distinction is applicable in the present case. When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution. Weeks v. United States, 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Dillon v. O'Brien and Davis, 16 Cox, C. C. 245; Getchell v. Page, 103 Me. 387, 69 A. 624, 18 L. R. A. (N. S.) 253, 125 Am. St. Rep. 307; Kneeland v. Connally, 70 Ga. 424; 1 Bishop, Criminal Procedure, § 211; 1 Wharton, Criminal Procedure (10th Ed.) § 97. The argument of defendants is based on the theory that the seizure in this case can only be thus justified. If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are

not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer ***159** has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as section 26 indicates. It is true that section 26, title 2, provides for immediate proceedings against the person arrested and that upon conviction the liquor is to be destroyed and the automobile or other vehicle is to be sold, with the saving of the interest of a lienor who does not know of its unlawful use; but it is evident that if the person arrested is ignorant of the contents of the vehicle, or if he escapes, proceedings can be had against the liquor for destruction or other disposition under section 25 of the same title. The character of the offense for which, after the contraband liquor is found and seized, the driver can be prosecuted does not affect the validity of the seizure.

This conclusion is in keeping with the requirements of the Fourth Amendment and the principles of search and seizure of contraband forfeitable property; and it is a wise one because it leaves the rule one which is easily applied and understood and is uniform. Houck v. State, 106 Ohio St. 195, 140 N. E. 112, accords with this conclusion. Ash v. United States (C. C. A.) 299 F. 277, and Milam v. United States (C. C. A.) 296 F. 629, decisions by the Circuit Court of Appeals for the Fourth Circuit take the same view. The Ash Case is very similar in its facts to the case at bar, and both were by the same court which decided Snyder v. United States (C. C. A.) 285 F. 1, cited for the defendants. See, also, Park v. United States (1st C. C. A.) 294 F. 776, 783, and Lambert v. United States (9th C. C. A.) 282 F. 413.

Finally, was there probable cause? In The Apollon, 9 Wheat. 362, 6 L. Ed. 111, the question was whether the seizure of a French vessel at a particular place was upon probable cause that she was there for the purpose of smuggling. In this discussion Mr. Justice Story, who delivered the judgment of the court, said (page 374):

'It has been very justly observed at the bar that the court is bound to take notice of public facts and geographical ***160** positions, and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be gathered from the public documents of the government.'

We know in this way that Grand Rapids is about 152 miles from Detroit, and that Detroit and its neighborhood along the Detroit river, which is the international boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. It is obvious from the evidence that the prohibition agents were engaged in a regular patrol along the important highways from Detroit to Grand Rapids to stop and seize liquor carried in automobiles. They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called 'bootleggers' in Grand Rapids; i. e., that they were engaged in plying the unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later these officers suddenly met the same ****288** men on their way westward presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers, which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor, we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear, ***161** the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants.

The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In Stacey v. Emery, 97 U. S. 642, 645 (24 L. Ed. 1035), a suit for damages for seizure by a collector, this court defined probable cause as follows:

'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.'

See Locke v. United States, 7 Cranch, 339, 3 L. Ed. 364; The George, 1 Mason, 24, Fed. Cas. No. 5328; The Thompson, 3 Wall. 155, 18 L. Ed. 55.

It was laid down by Chief Justice Shaw, in Commonwealth v. Carey, 12 Cush. 246, 251, that:

'If a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful.' Commonwealth v. Phelps, 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912B, 566; Rohan v. Sawin, 5 Cush. 281, 285.

In McCarthy v. De Armit, 99 Pa. 63, the Supreme Court of Pennsylvania sums up the definition of probable cause in this way (page 69):
'The substance of all the definitions is a reasonable ground for belief of guilt.'

In the case of the Director General v. Kastenbaum, 263 U. S. 25, 44 S. Ct. 52, 68 L. Ed. 146, which was a suit for false imprisonment, it was said by this court (page 28 [44 S. Ct. 53]):
'But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, ***162** which in the judgment of the court would make his faith reasonable.'

See, also, Munn v. De Nemours, 3 Wash. C. C. 37, Fed. Cas. No. 9926.

In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

Counsel finally argue that the defendants should be permitted to escape the effect of the conviction because the court refused on motion to deliver them the liquor when, as they say, the evidence adduced on the motion was much less than that shown on the trial, and did not show probable cause. The record does not make it clear what evidence was produced in support of or against the motion. But, apart from this, we think the point is without substance here. If the evidence given on the trial was sufficient, as we think it was, to sustain the introduction of the liquor as evidence, it is immaterial that there was an inadequacy of evidence when application was made for its return. A conviction on adequate and admissible evidence should not be set aside on such a ground. The whole matter was gone into at the trial, so no right of the defendants was infringed.

Counsel for the government contend that Kiro, the defendant who did not own the automobile, could not complain of the violation of the Fourth Amendment in the use of the liquor as evidence against him, whatever the view taken as to Carroll's rights. Our conclusion as to the whole case makes it unnecessary for us to discuss this aspect of it.

The judgment is affirmed.

***163** Mr. Justice McKENNA, before his retirement, concurred in this opinion.

The separate opinion of Mr. Justice McREYNOLDS.

1. The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as ****289** little consonant to private morality as to public justice.' Sir William Scott, The Le Louis, 2 Dodson, 210, 257.

While quietly driving an ordinary automobile along a much frequented public road, plaintiffs in error were arrested by federal officers without a warrant and upon mere suspicion—ill-founded, as I think. The officers then searched the machine and discovered carefully secreted whisky, which was seized and thereafter used as evidence against plaintiffs in error when on trial for transporting intoxicating liquor contrary to the Volstead Act. 41 Stat. 305, c. 85. They maintain that both arrest and seizure were unlawful and that use of the liquor as evidence violated their constitutional rights.

This is not a proceeding to forfeit seized goods; nor is it an action against the seizing officer for a tort. Cases like the following are not controlling: Crowell v. McFadon. 8 Cranch, 94, 98, 3 L. Ed. 499; United States v. 1960 Bags of Coffee, 8 Cranch, 398, 403, 405, 3 L. Ed. 602; Otis v. Watkins, 9 Cranch, 339, 3 L. Ed. 752; Gelston v. Hoyt, 3 Wheat. 246, 310, 318, 4 L. Ed. 381; Wood v. United States, 16 Pet. 342, 10 L. Ed. 987; Taylor v. United States, 3 How. 197, 205, 11 L. Ed. 559. They turned upon express provisions of applicable acts

of Congress; they did not involve the point now presented and afford little, if any, assistance toward its proper solution. The Volstead Act does not, in terms, authorize arrest or seizure upon mere suspicion.

***164** Whether the officers are shielded from prosecution or action by Rev. Stat. § 970, is not important. That section does not undertake to deprive the citizen of any constitutional right or to permit the use of evidence unlawfully obtained. It does, however, indicate the clear understanding of Congress that probable cause is not always enough to justify a seizure.

Nor are we now concerned with the question whether by apt words Congress might have authorized the arrest without a warrant. It has not attempted to do this. On the contrary, the whole history of the legislation indicates a fixed purpose not so to do. First and second violations are declared to be misdemeanors—nothing more—and Congress, of course, understood the rule concerning arrests for such offenses. Whether different penalties should have been prescribed or other provisions added is not for us to inquire; nor do difficulties attending enforcement give us power to supplement the legislation.

2. As the Volstead Act contains no definite grant of authority to arrest upon suspicion and without warrant for a first offense, we come to inquire whether such authority can be inferred from its provisions.

Unless the statute which creates a misdemeanor contains some clear provision to the contrary, suspicion that it is being violated will not justify an arrest. Criminal statutes must be strictly construed and applied, in harmony with rules of the common law. United States v. Harris, 177 U. S. 305, 310, 20 S. Ct. 609, 44 L. Ed. 780. And the well-settled doctrine is that an arrest for a misdemeanor may not be made without a warrant unless the offense is committed in the officer's presence.

Kurtz v. Moffitt, 115 U. S. 487, 498, 6 S. Ct. 148, 152 (29 L. Ed. 458):
'By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case ***165** of felony, and then only for the purpose of bringing the offender before a civil magistrate.'

John Bad Elk v. United States, 177 U. S. 529, 534, 20 S. Ct. 729, 731 (44 L. Ed. 874):
'An officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence.'

Commonwealth v. Wright, 158 Mass. 149, 158, 33 N. E. 82, 85 (19 L. R. A. 206, 35 Am. St. Rep. 475):
'It is suggested that the statutory misdemeanor of having in one's possession short lobsters with intent to sell them is a continuing offence, which is being committed while such possession continues, and that therefore an officer who sees any person in possession of such lobsters with intent to sell them can arrest such person without a warrant, as for a misdemeanor committed in his presence. We are of opinion, however, that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant, unless it is given by statute. * * * The Legislature has often empowered officers to arrest without a warrant for similar offenses, which perhaps tends to show that, in its opinion, no such right exists at common law.'

Pinkerton v. Verberg, 78 Mich. 573, 584, 44 N. W. 579, 582 (7 L. R. A. 507, 18 Am. St. Rep. 473):
'Any law which would place the keeping and safe-conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land.' 'If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer.'

3. The Volstead Act contains no provision which annuls the accepted common-law rule or discloses definite intent ***166** to authorize arrests ****290** without warrant for misdemeanors not committed in the officer's presence.

To support the contrary view section 26 is relied upon.
'When * * * any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or

possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.'

Let it be observed that this section has no special application to automobiles; it includes *any* vehicle—buggy, wagon, boat, or air craft. Certainly, in a criminal statute, always to be strictly construed, the words 'shall discover * * * in the act of transporting in violation of the law' cannot mean shall have reasonable cause to suspect or believe that such transportation is being carried on. To discover and to suspect are wholly different things. Since the beginning apt words have been used when Congress intended that arrests for misdemeanors or seizures might be made upon suspicion. It has studiously refrained from making a felony of the offense here charged; and it did not undertake by any apt words to enlarge the power to arrest. It was not ignorant of the established rule on the subject, and well understood how this could be abrogated, as plainly appears from statutes like the following:
'An act to regulate the collection of duties on imports and tonnage,' approved March 2, 1789, 1 Stat. 627, 677, 678, c. 22; 'An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported ***167** into the United States, and on the tonnage of ships or vessels,' approved August 4, 1790, 1 Stat. 145, 170, c. 35; 'An act further to provide for the collection of duties on imports and tonnage,' approved March 3, 1815, 3 Stat. 231, 232, c. 94.

These and similar acts definitely empowered officers to seize upon suspicion and therein radically differ from the Volstead Act, which authorized no such thing.

'An act supplemental to the National Prohibition Act,' approved November 23, 1921, 42 Stat. 222, 223, c. 134, provides:
'That any officer, agent, or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.'

And it is argued that the words and history of this section indicate the intent of Congress to distinguish between the necessity for warrants in order to search private dwelling and the right to search automobiles without one. Evidently Congress regarded the searching of private dwellings as matter of much graver consequence than some other searches and distinguished between them by declaring the former criminal. But the connection between this distinction and the legality of plaintiffs in error's arrest is not apparent. Nor can I find reason for inquiring concerning the validity of the distinction under the Fourth Amendment. Of course, the distinction is ***168** valid, and so are some seizures. But what of it? The act made nothing legal which theretofore was unlawful, and to conclude that by declaring the unauthorized search of a private dwelling criminal Congress intended to remove ancient restrictions from other searches and from arrests as well, would seem impossible.

While the Fourth Amendment denounces only unreasonable seizures unreasonableness often depends upon the means adopted. Here the seizure followed an unlawful arrest, and therefore became itself unlawful—as plainly unlawful as the seizure within the home so vigorously denounced in Weeks v. United States, 232 U. S. 383, 391, 392, 393, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

In Snyder v. United States, 285 F. 1, 2, the Court of Appeals, Fourth Circuit, rejected evidence obtained by an unwarranted arrest, and clearly announced some very wholesome doctrine: 'That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal

liberty of the defendant. That it happened in this instance to contain whisky, we think, ***169** neither ****291** justifies the assault nor condemns the principle which makes such an act unlawful.'

The validity of the seizure under consideration depends on the legality of the arrest. This did not follow the seizure, but the reverse is true. Plaintiffs in error were first brought within the officers' power, and, while therein, the seizure took place. If an officer, upon mere suspicion of a misdemeanor, may stop one on the public highway, take articles away from him and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments?

In Weeks v. United States, supra, through Mr. Justice Day, this court said:
'The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. * * * The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have ***170** resulted in their embodiment in the fundamental law of the land.'

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 391, 40 S. Ct. 182, 64 L. Ed. 319:
'The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidling the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.'

Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, and Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654, distinctly point out that property procured by unlawful action of federal officers cannot be introduced as evidence.

The arrest of plaintiffs in error was unauthorized, illegal, and violated the guaranty of due process given by the Fifth Amendment. The liquor offered in evidence was obtained by the search which followed this arrest and was therefore obtained in violation of their constitutional ***171** rights. Articles found upon or in the control of one lawfully arrested may be used as evidence for certain purposes, but not at all when secured by the unlawful action of a federal officer.

4. The facts known by the officers who arrested plaintiffs in error were wholly insufficient to create a reasonable belief that they were transporting liquor contrary to law. These facts were detailed by Fred Cronenwett, chief prohibition officer. His entire testimony as given at the trial follows:
'I am in charge of the federal prohibition department in this district. I am acquainted with these two respondents, and first saw them on September 29, 1921, in Mr. Scully's apartment on Oakes street, Grand Rapids. There were three of them that came to Mr. Scully's apartment, one by the name of Kruska, George Krio, and John Carroll. I was introduced to them under the name of Stafford, and told them I was working for the Michigan Chair Company, and wanted to buy three cases of whisky, and the price was agreed upon. After they thought I was all right, they said they would be back in half or three-quarters of an hour; that they had to go out to the east end of

Grand Rapids to get this liquor. They went away and came back in a short time, and Mr. Kruska came upstairs and said they couldn't get it that night; that a fellow by the name of Irving, where they were going to get it, wasn't in, but they were going to deliver it the next day, about ten. They didn't deliver it the next day. I am not positive about the price. It seems to me it was around $130 a case. It might be $135. Both respondents took part in this conversation. When they came to Mr. Scully's apartment they had this same car. While it was dark and I wasn't able to get a good look at this car, later, on the 6th day of October, when I was out on the road with Mr. Scully, I was waiting on the highway while he went to Reed's Lake to get a light ***172** lunch, and they drove by, and I had their license number and the appearance of their car, and knowing the two boys, seeing them on the 29th day of September, I was satisfied when I seen the car on December 15th it was the same car I had seen on the 6th day of October. On the 6th ****292** day of October it was probably twenty minutes before Scully got back to where I was. I told him the Carroll boys had just gone toward Detroit and we were trying to catch up with them and see where they were going. We did catch up with them somewhere along by Ada, just before we got to Ada, and followed them to East Lansing. We gave up the chase at East Lansing.

'On the 15th of December, when Peterson and Scully and I overhauled this car on the road, it was in the country, on Pike 16, the road leading between Grand Rapids and Detroit. When we passed the car we were going toward Ionia, or Detroit, and the Kiro and Carroll boys were coming towards Grand Rapids when Mr. Scully and I recognized them and said, 'There goes the Carroll brothers,' and we went on still further in the same direction we were going and turned around and went back to them—drove up to the side of them. Mr. Scully was driving the car; I was sitting in the front seat, and I stepped out on the running board and held out my hand and said, 'Carroll, stop that car,' and they did stop it. John Kiro was driving the car. After we got them stopped, we asked them to get out of the car, which they did. Carroll referred to me, and called me by the name of 'Fred,' just as soon as I got up to him. Raised up the back part of the roadster; didn't find any liquor there; then raised up the cushion; then I struck at the lazyback of the seat and it was hard. I then started to open it up, and I did tear the cushion some, and Carroll said, 'Don't tear the cushion; we have only got six cases in there;' and I took out two bottles and found out it was liquor; satisfied it was liquor. Mr. Peterson and a fellow by the ***173** name of Gerald Donker came in with the two Carroll boys and the liquor and the car to Grand Rapids. They brought the two defendants and the car and the liquor to Grand Rapids. I and the other men besides Peterson stayed out on the road, looking for other cars that we had information were coming in. There was conversation between me and Carroll before Peterson started for town with the defendants. Mr. Carroll said, 'Take the liquor, and give us one more chance, and I will make it right with you.' At the same time he reached in one of his trousers pockets and pulled out money; the amount of it I don't know. I wouldn't say it was a whole lot. I saw a $10 bill and there was some other bills; I don't know how much there was; it wasn't a large amount.

'As I understand, Mr. Hanley helped carry the liquor from the car. On the next day afterwards, we put this liquor in boxes, steel boxes, and left it in the marshal's vault, and it is still there now. Mr. Hanley and Chief Deputy Johnson, some of the agents and myself were there. Mr. Peterson was there the next day that the labels were signed by the different officers; those two bottles, Exhibits A and B.

'Q. Now, those two bottles, Exhibits A and B, were those the two bottles you took out of the car out there, or were those two bottles taken out of the liquor after it got up here? A. We didn't label them out on the road; simply found it was liquor and sent it in; and this liquor was in Mr. Hanley's custody that evening and during the middle of the next day when we checked it over to see the amount of liquor that was there. Mr. Johnson and I sealed the bottles, and Mr. Johnson's name is on the label that goes over the bottle with mine, and this liquor was taken out of the case to-day. It was taken out for the purpose of analyzation. The others were not broken until to-day.

***174** 'Q. And are you able to tell us, from the label and from the bottles, whether it is part of the same liquor taken out of that car? A. It has the appearance of it; yes, sir. Those are the bottles that were in there that Mr. Hanley said was gotten out of the Carroll car.'

Cross-examination:
'I think I was the first one to get back to the Carroll car after it was stopped. I had a gun in my pocket; I didn't present it. I was the first one to the car and raised up the back of the car, but the others were there shortly afterward. We assembled right around the car immediately.

'Q. And whatever examination and what investigation you made you went right ahead and did it in your own way? A. Yes, sir.

'Q. And took possession of it, arrested them, and brought them in? A. Yes, sir.

'Q. And at that time, of course, you had no search warrant? A. No, sir. We had no knowledge that this car was coming through at that particular time.'

Redirect examination:
'The lazyback was awfully hard when I struck it with my fist. It was harder than upholstery ordinarily is in those backs; a great deal harder. It was practically solid. Sixty-nine quarts of whisky in one lazyback.'

The negotiation concerning three cases of whisky on September 29th was the only circumstance which could have subjected plaintiffs in error to any reasonable suspicion. No whisky was delivered, and it is not certain that they ever intended to deliver any. The arrest came 2 ½ months after the negotiation. Every act in the meantime is consistent with complete innocence. Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!

5. When Congress has intended that seizures or arrests might be made upon suspicion it has been careful to say ***175** so. The history and terms of the Volstead Act are not consistent with the suggestion that it was the purpose of Congress to grant the power here claimed for enforcement officers. The facts known when the arrest occurred were wholly insufficient to engender reasonable belief that plaintiffs in error were committing a misdemeanor, and the legality of the arrest cannot be supported by facts ascertained through the search which followed.

To me it seems clear enough that the judgment should be reversed.

I am authorized to say that Mr. Justice SUTHERLAND concurs in this opinion.

All Citations

267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790

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90 S.Ct. 1975
Supreme Court of the United States

Frank CHAMBERS, Petitioner,

v.

James F. MARONEY, Superintendent, State Correctional Institution.

No. 830.
|
Argued April 27, 1970.
|
Decided June 22, 1970.
|
Rehearing Denied Oct. 12, 1970.

See 91 S.Ct. 23.

Synopsis

Habeas corpus proceeding. The United States District Court for the Western District of Pennsylvania denied petition without a hearing, and petitioner appealed. The Court of Appeals, 3 Cir., 408 F.2d 1186 affirmed, and certiorari was granted. The Supreme Court, Mr. Justice White, held that where police, as result of talking to victim and teen-age observers, had probable cause to believe that robbers, carrying guns and fruits of crime, had fled scene in light blue compact station wagon carrying four men, one wearing a green sweater and another wearing a trench coat, officers had probable cause to stop automobile and search it for guns and stolen money, and search of automobile at station house without warrant was not improper.

Affirmed.

Mr. Justice Stewart concurred and filed opinion.

Mr. Justice Harlan concurred in part and dissented in part and filed opinion.

Attorneys and Law Firms

****1977** ***43** Vincent J. Grogan, Pittsburgh, Pa., for petitioner.

Carol Mary Los, Pittsburgh, Pa., for respondent, pro hac vice, by special leave of Court.

Opinion

Mr. Justice WHITE delivered the opinion of the Court.

The principal question in this case concerns the admissibility of evidence seized from an automobile, in which petitioner was riding at the time of his arrest, after the automobile was taken to a police station and was there thoroughly searched without a warrant. The Court of Appeals for the Third Circuit found no violation of petitioner's Fourth Amendment rights. We affirm.

***44** I

During the night of May 20, 1963, a Gulf service station in North Braddock, Pennsylvania, was robbed by two men, each of whom carried and displayed a gun. The robbers took the currency from the cash register; the service station attendant, one Stephen Kovacich, was directed to place the coins in his right-hand glove, which was then taken by the robbers. Two teen-agers, who had earlier noticed a blue compact station wagon circling the block in the vicinity of the Gulf station, then saw the station wagon speed away from a parking lot close to the Gulf station. About the same time, they learned that the Gulf station had been robbed. They reported to police, who arrived immediately, that four men were in the station wagon and one was wearing a green sweater. Kovacich told the police that one of the men who robbed him was wearing a green sweater and the other was wearing a trench coat. A description of the car and the two robbers was broadcast over the police radio. Within an hour, a light blue compact station wagon answering the description and carrying four men was stopped by the police about two miles from the Gulf station. Petitioner was one of the men in the station wagon. He was wearing a green sweater and there was a trench coat in the car. The occupants were arrested and the car was driven to the police station. In the course of a thorough search of the car at the station, the police found concealed in a compartment under the dashboard two .38—caliber revolvers (one loaded with dumdum bullets), a right-hand glove containing small change, and certain cards bearing the name of Raymond Havicon, the attendant at a Boron service station in McKeesport, Pennsylvania, who had been robbed at gunpoint on May 13, 1963. In the course of a warrant-authorized search of petitioner's home the day after petitioner's arrest, police found and ***45** seized certain .38-

caliber ammunition, including some dumdum bullets similar to those found in one of the guns taken from the station wagon.

**1978 Petitioner was indicted for both robberies.[1] His first trial ended in a mistrial but he was convicted of both robberies at the second trial. Both Kovacich and Havicon identified petitioner as one of the robbers.[2] The materials taken from the station wagon were introduced into evidence, Kovacich identifying his glove and Havicon the cards taken in the May 13 robbery. The bullets seized at petitioner's house were also introduced over objections of petitioner's counsel.[3] Petitioner was sentenced to a term of four to eight years' imprisonment for the May 13 robbery and to a term of two to seven years' imprisonment for the May 20 robbery, the sentences to run consecutively.[4] Petitioner did not take a direct appeal from these convictions. In 1965, petitioner sought a writ of habeas corpus in the state court, which denied the writ after a brief evidentiary hearing; the denial of *46 the writ was affirmed on appeal in the Pennsylvania appellate courts. Habeas corpus proceedings were then commenced in the United States District Court for the Western District of Pennsylvania. An order to show cause was issued. Based on the State's response and the state court record, the petition for habeas corpus was denied without a hearing. The Court of Appeals for the Third Circuit affirmed, 408 F.2d 1186 and we granted certiorari, 396 U.S. 900, 90 S.Ct. 225, 24 L.Ed.2d 177 (1969).[5]

II

We pass quickly the claim that the search of the automobile was the fruit of an unlawful arrest. Both the **1979 courts below thought the arresting officers had probable cause to make the arrest. We agree. Having talked to the teen-age observers and to the victim Kovacich, the police had ample cause to stop a light blue compact station wagon carrying four men and to arrest the occupants, one of whom was wearing a green sweater *47 and one of whom had a trench coat with him in the car.[6]

Even so, the search that produced the incriminating evidence was made at the police station some time after the arrest and cannot be justified as a search incident to an arrest: 'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.' Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964). Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968), is to the same effect; the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house.

There are, however alternative grounds arguably justifying the search of the car in this case. In Preston, supra, the arrest was for vagrancy; it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto. In Dyke, supra, the Court expressly rejected the suggestion that there was probable cause to search the car, 391 U.S., at 221—222, 88 S.Ct. 1475—1476. Here the situation is different, for the police had probable cause to believe that the robbers, carrying guns and the fruits of the crime, had fled the scene in a light blue compact station wagon which would be carrying four men, one wearing a green sweater and another wearing a trench coat. As the state courts correctly held, there was probable cause to arrest the occupants of the station wagon that the officers stopped; just as obviously was *48 there probable cause to search the car for guns and stolen money.

In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office. In Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the issue was the admissibility in evidence of contraband liquor seized in a warrantless search of a car on the highway. After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. The Court expressed its holding as follows:

'We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

**1980 'Having thus established that contraband goods concealed and illegally transported in an automobile or other

vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. * * * (T)hose lawfully within the country, entitled to use ***49** the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. * * *

'The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.' 267 U.S., at 153—154, 155-156, 45 S.Ct. at 285—286.

The Court also noted that the search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest:
'The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.' 267 U.S., at 158—159, 45 S.Ct. at 287.

Finding that there was probable cause for the search and seizure at issue before it, the Court affirmed the convictions.

Carroll was followed and applied in Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629 (1931), and Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938). It was reaffirmed and followed in Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). In 1964, the opinion in Preston, supra, cited both Brinegar and Carroll with approval, 376 U.S., at 366—367, 84 S.Ct. at 882—883. In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967),[7] ***50** the Court read Preston as dealing primarily with a search incident to arrest and cited that case for the proposition that the mobility of a car may make the search of a car without a warrant reasonable 'although the result might be the opposite in a search of a home, a store, or other fixed piece of property.' 386 U.S., at 59, 87 S.Ct. at 790. The Court's opinion in Dyke, 391 U.S., at 221, 88 S.Ct. at 1475, recognized that '(a)utomobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office,' citing Brinegar and Carroll, supra. However, because there was insufficient reason to search the car involved in the Dyke case, the Court did not reach the question of whether those cases 'extend to a warrantless search, based upon probable cause, of an automobile which, having been stopped originally on a highway, is parked outside a courthouse.' 391 U.S., at 222, 88 S.Ct. at 1476.[8]

Neither Carroll, supra, nor other cases in this Court require or suggest that in ****1981** every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that ***51** furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in Carroll and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.[9]

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. Carroll, supra, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.

Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety ***52** of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.[10] The same consequences **1982 may not follow where there is unforeseeable cause to search a house. Compare Vale v. Louisiana, ante, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409. But as Carroll, supra, held, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.

III

Neither of petitioner's remaining contentions warrants reversal of the judgment of the Court of Appeals. One of them challenges the admissibility at trial of the .38-caliber ammunition seized in the course of a search of petitioner's house. The circumstances relevant to this *53 issue are somewhat confused, involving as they do questions of probable cause, a lost search warrant, and the Pennsylvania procedure for challenging the admissibility of evidence seized. Both the District Court and the Court of Appeals, however, after careful examination of the record, found that if there was error in admitting the ammunition, the error was harmless beyond a reasonable doubt. Having ourselves studied this record, we are not prepared to differ with the two courts below. See Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

The final claim is that petitioner was not afforded the effective assistance of counsel. The facts pertinent to this claim are these: The Legal Aid Society of Allegheny County was appointed to represent petitioner prior to his first trial. A representative of the society conferred with petitioner, and a member of its staff, Mr. Middleman, appeared for petitioner at the first trial. There is no claim that petitioner was not then adequately represented by fully prepared counsel. The difficulty arises out of the second trial. Apparently no one from the Legal Aid Society again conferred with petitioner until a few minutes before the second trial began. The attorney who then appeared to represent petitioner was not Mr. Middleman but Mr. Tamburo, another Legal Aid Society attorney. No charge is made that Mr. Tamburo was incompetent or inexperienced; rather the claim is that his appearance for petitioner was so belated that he could not have furnished effective legal assistance at the second trial. Without granting an evidentiary hearing, the District Court rejected petitioner's claim. The Court of Appeals dealt with the matter in an extensive opinion. After carefully examining the state court record, which it had before it, the court found ample grounds for holding that the appearance of a different attorney at the second trial had not resulted in prejudice to petitioner. The claim that Mr. Tamburo *54 was unprepared centered around his allegedly inadequate efforts to have the guns and ammunition excluded from evidence. But the Court of Appeals found harmless any error in the admission of the bullets and ruled that the guns and other materials seized from the car were admissible evidence. Hence the claim of prejudice from the substitution of counsel was without substantial basis.[11] In this posture of the case we are not inclined to disturb the judgment of the Court of Appeals as to what the state record shows with respect to the adequacy of counsel. Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a per se rule requiring reversal of every **1983 conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel. The Court of Appeals reached the right result in denying a hearing in this case.

Affirmed.

Mr. Justice BLACKMUN took no part in the consideration or decision of this case.

Mr. Justice STEWART, concurring.

I adhere to the view that the admission at trial of evidence acquired in alleged violation of Fourth Amendment *55 standards is not of itself sufficient ground for a collateral attack upon an otherwise valid criminal conviction, state or federal. See Harris v. Nelson, 394 U.S. 286, 307, 89 S.Ct. 1082, 1094—1095, 22 L.Ed.2d 281 (dissenting opinion); Kaufman v. United States, 394 U.S. 217, 242, 89 S.Ct. 1068, 1082, 22 L.Ed.2d 227 (dissenting opinion). But until the Court adopts that view, I regard myself as obligated to consider the merits of the Fourth and Fourteenth Amendment claims in a

case of this kind. Upon that premise I join the opinion and judgment of the Court.

Mr. Justice HARLAN, concurring in part and dissenting in part.

I find myself in disagreement with the Court's disposition of this case in two respects.

I

I cannot join the Court's casual treatment of the issue that has been presented by both parties as the major issue in this case: petitioner's claim that he received ineffective assistance of counsel at his trial. As the Court acknowledges, petitioner met Mr. Tamburo, his trial counsel, for the first time en route to the courtroom on the morning of trial. Although a different Legal Aid Society attorney had represented petitioner at his first trial, apparently neither he nor anyone else from the society had conferred with petitioner in the interval between trials. Because the District Court did not hold an evidentiary hearing on the habeas petition, there is no indication in the record of the extent to which Mr. Tamburo may have consulted petitioner's previous attorney, the attorneys for the other defendants, or the files of the Legal Aid Society. What the record does disclose on this claim is essentially a combination of two factors: the entry of counsel into the case immediately ***56** before trial, and his handling of the issues that arose during the trial.[1]

As respondent must concede, counsel's last-minute entry into the case precluded his compliance with the state rule requiring that motions to suppress evidence be made before trial, even assuming that he had sufficient acquaintance with the case to know what arguments were worth making. Furthermore, the record suggests that he may have had virtually no such acquaintance.

****1984** In the first place, he made no objection to the admission in evidence of the objects found during the search of the car at the station house after the arrest of its occupants, although that search was of questionable validity under Fourth Amendment standards, see infra.

Second, when the prosecution offered in evidence the bullets found in the search of petitioner's home, which had been excluded on defense objection at the first trial, Mr. Tamburo objected to their admission, but in a manner that suggested that he was a stranger to the facts of the case. While he indicated that he did know of the earlier exclusion, he apparently did not know on what ground the bullets had been excluded, and based his ***57** objection only on their asserted irrelevance.[2] Later in the trial he renewed his objection on the basis of the inadequacy of the warrant, stating, 'I didn't know a thing about the search Warrant until this morning.' App. 130.[3]

Third, when prosecution witness Havicon made an in-court identification of petitioner as the man who had ***58** threatened him with a gun during one of the robberies, Mr. Tamburo asked questions in cross-examination that suggested that he had not had time to settle upon a trial strategy or even to consider whether petitioner would take the stand. Mr. Tamburo asked whether, at a pretrial lineup, a detective had not told Havicon that petitioner 'was the man with the gun.' After Havicon's negative answer, this colloquy ensued:
'THE COURT: I take it you will be able to disprove that, will you?

'MR. TAMBURO: What?

'THE COURT: You shouldn't ask that question unless you are prepared to disprove that, contradict him.

'MR. TAMBURO: I have the defendant's testimony.

'THE COURT: Disprove it in any way at all.

'MR. MEANS (the prosecutor): I don't understand how the defendant would know what the detectives told him.

'THE COURT: He said he is going to disprove it by the defendant, that's all right, go ahead.' App. 34.

****1985** The next witness was a police officer who had been present at the lineup, and who testified that no one had told Havicon whom to pick out. Petitioner's counsel did not cross-examine, and petitioner never took the stand.

On this state of the record the Court of Appeals ruled that, although the late appointment of counsel necessitated close scrutiny into the effectiveness of his representation, petitioner 'was not prejudiced by the late appointment of counsel' because neither of the Fourth Amendment claims belatedly raised justified reversal of ***59** the conviction. 408 F.2d 1186, 1196. I agree that the strength of the search-and-seizure claims is an element to be considered in the assessment of whether counsel was adequately prepared to make an effective defense, but I cannot agree that the relevance of

those claims in this regard disappears upon a conclusion by an appellate court that they do not invalidate the conviction.

This Court recognized long ago that they duty to provide counsel 'is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.' Powell v. Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932); Hawk v. Olson, 326 U.S. 271, 278, 66 S.Ct. 116, 322, 90 L.Ed. 61 (1945). While 'the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial,' the Court has recognized that
'the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.' Avery v. Alabama, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940).

Where counsel has no acquaintance with the facts of the case and no opportunity to plan a defense, the result is that the defendant is effectively denied his constitutional right to assistance of counsel.

It seems to me that what this record reveals about counsel's handling of the search and seizure claims and about the tenor of his cross-examination of the government witness Havicon, when coupled with his late entry into the case, called for more exploration by the District Court before petitioner's ineffective assistance of counsel claim could be dismissed. Such an exploration should ***60** have been directed to ascertaining whether the circumstances under which Mr. Tamburo was required to undertake petitioner's defense at the second trial were such as to send him into the courtroom with so little knowledge of the case as to render him incapable of affording his client adequate representation. The event of that exploration would turn, not on a mere assessment of particular missteps or omissions of counsel, whether or not caused by negligence, cf. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), but on the District Court's evaluation of the total picture, with the objective of determining whether petitioner was deprived of rudimentary legal assistance. See Williams v. Beto, 354 F.2d 698 (C.A.5th Cir. 1965). And, of course, such an exploration would not be confined to the three episodes that, in my opinion, triggered the necessity for a hearing.

It is not an answer to petitioner's claim for a reviewing court simply to conclude that he has failed after the fact to show that, with adequate assistance, he would have prevailed at trial. Glasser v. United States, 315 U.S. 60, 75—76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942); cf. White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); Reynolds v. Cochran, 365 U.S. 525, 530—533, 81 S.Ct. 723, 726—727, 5 L.Ed.2d 754 (1961). Further inquiry might show, of course, that counsel's opportunity for preparation was adequate to protect petitioner's ****1986** interests,[4] but petitioner did, in my view, raise a sufficient doubt on that score to be entitled to an evidentiary hearing.[5]

***61** II

In sustaining the search of the automobile I believe the Court ignores the framework of our past decisions circumscribing the scope of permissible search without a warrant. The Court has long read the Fourth Amendment's proscription of 'unreasonable' searches as imposing a general principle that a search without a warrant is not justified by the mere knowledge by the searching officers of facts showing probable cause. The 'general requirement that a search warrant be obtained' is basic to the Amendment's protection of privacy, and "the burden is on those seeking (an) exemption * * * to show the need for it." E.g., Chimel v. California, 395 U.S. 752, 762, 89 S.Ct. 2034, 2039 (1969); Katz v. United States, 389 U.S. 347, 356—358, 88 S.Ct. 507, 514—515, 19 L.Ed.2d 576 (1967); Warden v. Hayden, 387 U.S. 294, 299, 87 S.Ct. 1642, 1646, 18 L.Ed.2d 782 (1967); Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964); United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951); McDonald v. United States, 335 U.S. 451, 455—456, 69 S.Ct. 191, 193—194, 93 L.Ed. 153 (1948); Agnello v. United States, 269 U.S. 20, 33 46 S.Ct. 4, 6—7, 70 L.Ed. 145 (1925).

Fidelity to this established principle requires that, where exceptions are made to accommodate the exigencies of particular situations, those exceptions be no broader than necessitated by the circumstances presented. For example, the Court has recognized that an arrest creates an emergency situation justifying a warrantless search of the arrestee's person and of 'the area from within which he might gain possession of a weapon or destructible evidence'; however, because the exigency giving rise to this exception extends only that far, the search may go no further. Chimel v. California, 395 U.S., at 763, 89 S.Ct. at 2040; Trupiano v.

United States, 334 U.S. 699, 705, 708, 68 S.Ct. 1229, 1232—1234, 92 L.Ed. 1663 (1948). Similarly we held in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), that a warrantless search in a 'stop and frisk' situation must 'be strictly circumscribed ***62** by the exigencies which justify its initiation.' Id., at 26, 88 S.Ct. at 1882. Any intrusion beyond what is necessary for the personal safety of the officer or others nearby is forbidden.

Where officers have probable cause to search a vehicle on a public way, a further limited exception to the warrant requirement is reasonable because 'the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' Carroll v. United States, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). Because the officers might be deprived of valuable evidence if required to obtain a warrant before effecting any search or seizure, I agree with the Court that they should be permitted to take the steps necessary to preserve evidence and to make a search possible.[6] Cf. ALI, Model Code of ****1987** Pre-Arraignment Procedure s 6.03 (Tent. Draft No. 3, 1970). The Court holds that those steps include making a warrantless search of the entire vehicle on the highway—a conclusion reached by the Court in Carroll without discussion—and indeed appears to go further and to condone the removal of the car to the police station for a warrantless search there at the convenience of the police.[7] I cannot agree that this result is consistent ***63** with our insistence in other areas that departures from the warrant requirement strictly conform to the exigency presented.

The Court concedes that the police could prevent removal of the evidence by temporarily seizing the car for the time necessary to obtain a warrant. It does not dispute that such a course would fully protect the interests of effective law enforcement; rather it states that whether temporary seizure is a 'lesser' intrusion than warrantless search 'is itself a debatable question and the answer may depend on a variety of circumstances.' Ante, at 1981.[8] I believe it clear that a warrantless search involves the greater sacrifice of Fourth Amendment values.

The Fourth Amendment proscribes, to be sure, unreasonable 'seizures' as well as 'searches.' However, in the circumstances in which this problem is likely to occur, the lesser intrusion will almost always be the simple seizure of the car for the period—perhaps a day—necessary to enable the officers to obtain a search warrant. In the first place, as this case shows, the very facts establishing probable cause to search will often ***64** also justify arrest of the occupants of the vehicle. Since the occupants themselves are to be taken into custody, they will suffer minimal further inconvenience from the temporary immobilization of their vehicle. Even where no arrests are made, persons who wish to avoid a search—either to protect their privacy or to conceal incriminating evidence—will almost certainly prefer a brief loss of the use of the vehicle in exchange for the opportunity to have a magistrate pass upon the justification for the search. To be sure, one can conceive of instances in which the occupant, ****1988** having nothing to hide and lacking concern for the privacy of the automobile, would be more deeply offended by a temporary immobilization of his vehicle than by a prompt search of it. However, such a person always remains free to consent to an immediate search, thus avoiding any delay. Where consent is not forthcoming, the occupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure. Terry v. Ohio, supra. The Court's endorsement of a warrantless invasion of that privacy where another course would suffice is simply inconsistent with our repeated stress on the Fourth Amendment's mandate of "adherence to judicial processes." E.g., Katz v. United States, 389 U.S., at 357, 88 S.Ct., at 514.[9]

Indeed, I beleive this conclusion is implicit in the opinion of the unanimous Court in ***65** Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964). The Court there purported to decide whether a factual situation virtually identical to the one now before us was 'such as to fall within any of the exceptions to the constitutional rule that a search warrant must be had before a search may be made.' Id., at 367, 84 S.Ct., at 883 (emphasis added). The Court concluded that no exception was available, stating that 'since the men were under arrest at the police station and the car was in police custody at a garage, (there was no) danger that the car would be moved out of the locality or jurisdiction.' Id., at 368, 84 S.Ct., at 884. The Court's reliance on the police custody of the car as its reason for holding 'that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment,' ibid., can only have been based on the premise that the more reasonable course was for the police to retain custody of the car for the short time necessary to obtain a warrant. The Court expressly did not rely, as suggested today, on the fact that an arrest for vagrancy provided 'no cause to believe that evidence of crime was concealed in the auto.' Ante, at 1979; see 376 U.S., at 368; Wood v. Crouse, 417 F.2d 394, 397—398 (C.A.10th Cir. 1969). The Court now discards the approach taken in Preston, and creates a special rule for automobile searches that is seriously at odds with generally applied Fourth Amendment principles.

III

The Court accepts the conclusion of the two courts below that the introduction of the bullets found in petitioner's home, if error, was harmless. Although, as explained above, I do not agree that this destroys the relevance of the issue to the ineffectiveness of counsel claim, I agree that the record supports the lower courts' conclusion that this item of evidence, taken alone, was harmless beyond a reasonable doubt.

All Citations

399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419

Footnotes

1 Petitioner was indicted separately for each robbery. One of the other three men was similarly indicted and the other two were indicted only for the Gulf robbery. All indictments and all defendants were tried together. In a second trial following a mistrial, the jury found all defendants guilty as charged.

2 Kovacich identified petitioner at a pretrial stage of the proceedings, and so testified, but could not identify him at the trial. Havicon identified petitioner both before trial and at trial.

3 The bullets were apparently excluded at the first trial. The grounds for the exclusion do not clearly appear from the record now before us.

4 The four-to-eight-year sentence was to be served concurrently with another sentence, for an unrelated armed robbery offense, imposed earlier but vacated subsequent to imposition of sentence in this case. The two-to-seven-year term was to be consecutive to the other sentences. It appears that the offenses here at issue caused revocation of petitioner's parole in connection with a prior conviction. Apparently petitioner has now begun to serve the first of the two sentences imposed for the convictions here challenged.

5 Since Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), the federal courts have regularly entertained and ruled on petitions for habeas corpus filed by state prisoners alleging that unconstitutionally seized evidence was admitted at their trials. See, e.g., Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). As for federal prisoners, a divided Court held that relief under 28 U.S.C. s 2255 was available to vindicate Fourth Amendment rights. Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969). Right-to-counsel claims of course have regularly been pressed and entertained in federal habeas corpus proceedings.

It is relevant to note here that petitioner Chambers at trial made no objection to the introduction of the items seized from the car; however his Fourth Amendment claims with respect to the auto search were raised and passed on by the Pennsylvania courts in the state habeas corpus proceeding. His objection to the search of his house was raised at his trial and rejected both on the merits and because he had not filed a motion to suppress; similar treatment was given the point in the state collateral proceedings, which took place before the same judge who had tried the criminal case. The counsel claim was not presented at trial but was raised and rejected in the state collateral proceedings.

6 In any event, as we point out below, the validity of an arrest is not necessarily determinative of the right to search a car if there is probable cause to make the search. Here as will be true in many cases, the circumstances justifying the arrest are also those furnishing probable cause for the search.

7 Cooper involved the warrantless search of a car held for forfeiture under state law. Evidence seized from the car in that search was held admissible. In the case before us no claim is made that state law authorized that the station wagon be held as evidence or as an instrumentality of the crime; nor was the station wagon an abandoned or stolen vehicle. The question here is whether probable cause justifies a warrantless search in the circumstances presented.

8 Nothing said last term in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), purported to modify or affect the rationale of Carroll. As the Court noted:

'Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' Carroll v. United States, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543; see Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879.' 395 U.S., at 764 n. 9, 89 S.Ct. at 2040.

9 Following the car until a warrant can be obtained seems an impractical alternative since, among other things, the car may be taken out of the jurisdiction. Tracing the car and searching it hours or days later would of course permit instruments or fruits of crime to be removed from the car before the search.

10 It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.

11 It is pertinent to note that each of the four defendants was represented by separate counsel. The attorney for Lawson, who was the car owner and who was the only defendant to take the stand, appears to have been the lead counsel. As far as the record before us reveals, no counsel made any objection at the trial to the admission of the items taken from the car. Petitioner's counsel objected to the introduction of the bullets seized from petitioner's house.

1 Respondent concedes in this Court that 'no other facts are available to determine the amount and the quality of the preparation for trial pursued by Mr. Tamburo or the amount of evidentiary material known by and available to him in determining what, if any, evidentiary objections were mandated or what, if any, defenses were available to petitioner.' Brief for Respondent 13. The Court of Appeals stated: 'We do not know what preparation, if any, counsel was able to accomplish prior to the date of the trial as he did not testify in the state habeas corpus proceeding and there was no evidentiary hearing in the district court. From the lower court opinion, as will appear later, we are led to believe that counsel was not wholly familiar with all aspects of the case before trial.' 408 F.2d 1186, 1191.

2 Mr. Tamburo stated to the trial court: 'Your Honor, at the first trial, the District Attorney attempted to introduce into evidence some .38 calibre bullets that were found at the Chambers' home after his arrest. * * * At that trial, it was objected to and the objection was sustained, and I would also like to object to it now, I don't think it is good for the Jury to hear it. I don't feel there is any relevancy or connection between the fact there were .38 calibre bullets at his home and the fact that a .38 calibre gun was found, not on the person of Chambers, but in the group.' App. 82.

This was the only instance in which Mr. Tamburo expressed any knowledge of what had transpired at the first trial, and it does not appear whether he learned of the exclusion from his brief talk with petitioner en route to the courtroom or from sources within the Legal Aid Society. The record does not disclose the reason for the exclusion of the bullets at the first trial.

3 This colloquy followed the renewed objection:

'THE COURT: Well, of course, you have known about this from the other trial three weeks ago.

'MR. TAMBURO: I wasn't the attorney at the other trial.

'THE COURT: But, you knew about it?

'MR. TAMBURO: I didn't know a thing about the search Warrant until this morning.

'THE COURT: You knew about the evidence about to be introduced, you told me about it.

'MR. TAMBURO: It wasn't admitted.

'THE COURT: That doesn't mean I have to exclude it now.' Id., at 130.

The court proceeded to overrule the objection on the ground that it had not been made in a pretrial motion, adding that 'I think there is reasonable ground for making a search here, even without a Warrant.' Id., at 130—131.

4 In Avery, this Court concluded on the basis of a hearing: 'That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted.' 308 U.S., at 452, 60 S.Ct. at 325.

5 The absence of any request by counsel for a continuance of the trial should not, in my opinion, serve to vitiate petitioner's claim at this juncture.

6 Where a suspect is lawfully arrested in the automobile, the officers may, of course, perform a search within the limits prescribed by Chimel as an incident to the lawful arrest. However, as the Court recognizes, the search here exceeded those limits. Nor was the search here within the limits imposed by pre-Chimel law for searches incident to arrest; therefore, the retroactivity of Chimel is not drawn into question in this case. See Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964).

7 The Court disregards the fact that Carroll and each of this Court's decisions upholding a warrantless vehicle search on its authority, involved a search for contraband. Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938); Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629 (1931); see United States v. Di Re, 332 U.S. 581, 584—586, 68 S.Ct. 222, 223—225, 92 L.Ed. 210 (1948). Although subsequent dicta have omitted this limitation, see Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221, 88 S.Ct. 1472, 1475, 20 L.Ed.2d 538 (1968); United States v. Ventresca, 380 U.S. 102, 107 n. 2, 85 S.Ct. 741, 745, 13 L.Ed.2d 684 (1965); United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 433, 94 L.Ed. 653 (1950), id., at 73, 70 S.Ct., at 438 (Frankfurter, J., dissenting), the Carroll decision has not until today been held to authorize a general search of a vehicle for evidence of crime, without a warrant, in every case where probable cause exists.

8 The Court, unable to decide whether search or temporary seizure is the 'lesser' intrusion, in this case authorizes both. The Court concludes that it was reasonable for the police to take the car to the station, where they searched it once to no avail. The searching officers then entered the station, interrogated petitioner and the car's owner, and returned later for another search of the car—this one successful. At all times the car and its contents were secure against removal or destruction. Nevertheless the Court approves the searches without even an inquiry into the officers' ability promptly to take their case before a magistrate.

9 Circumstances might arise in which it would be impracticable to immobilize the car for the time required to obtain a warrant —for example, where a single police officer must take arrested suspects to the station, and has no way of protecting the suspects' car during his absence. In such situations it might be wholly reasonable to perform an on-the-spot search based on probable cause. However, where nothing in the situation makes impracticable the obtaining of a warrant, I cannot join the Court in shunting aside that vital Fourth Amendment safeguard.

119 S.Ct. 2013
Supreme Court of the United States

MARYLAND, Petitioner,

v.

Kevin Darnell DYSON.

No. 98-1062.
|
June 21, 1999.

Synopsis

Defendant was convicted in state court of conspiracy to possess cocaine with intent to distribute. Defendant appealed. The Maryland Court of Special Appeals, 122 Md.App. 413, 712 A.2d 573, reversed. After the Maryland Court of Appeals denied certiorari, State petitioned for writ of certiorari. The Supreme Court held that finding of probable cause that vehicle contained contraband satisfied automobile exception to search warrant requirement.

Petition granted and judgment reversed.

Justice Breyer dissented and filed opinion in which Justice Stevens joined.

Opinion

****2013** ***465** PER CURIAM.

In this case, the Maryland Court of Special Appeals held that the Fourth Amendment requires police to obtain a search warrant before searching a vehicle which they have probable cause to believe contains illegal drugs. Because this holding rests upon an incorrect interpretation of the automobile exception to the Fourth Amendment's warrant requirement, we grant the petition for certiorari and reverse.

At 11 a.m. on the morning of July 2, 1996, a St. Mary's County (Maryland) Sheriff's Deputy received a tip from a reliable confidential informant that respondent had gone to New York to buy drugs, and would be returning to Maryland in a rented red Toyota, license number DDY 787, later that day with a large quantity of cocaine. The deputy investigated ***466** the tip and found that the license number given to him by the informant belonged to a red Toyota Corolla that had been rented to respondent, who was a known drug dealer in St. Mary's County. When respondent returned to St. Mary's County in the rented car at 1 a.m. on July 3, the deputies stopped and searched the vehicle, finding 23 grams of crack cocaine in a duffel bag in the trunk. Respondent was arrested, tried, and convicted of conspiracy to possess cocaine with intent to distribute. He appealed, arguing that the trial court had erroneously denied his motion to suppress the cocaine on the alternative grounds that the police lacked probable cause, or that even if there was probable cause, the warrantless search violated the Fourth Amendment because there was sufficient time after the informant's tip to obtain a warrant.

The Maryland Court of Special Appeals reversed, 122 Md.App. 413, 712 A.2d 573 (1998), holding that in order for the automobile exception to the warrant requirement to apply, there must not only be probable cause to believe that evidence of a crime is contained in the automobile, but also a separate finding of exigency precluding the police from obtaining a warrant. *Id.,* at 424, 712 A.2d, at 578. Applying this rule to the facts of the case, the Court of Special Appeals concluded that although there was "abundant probable cause," the search violated the Fourth Amendment because there was no exigency that prevented or even made it significantly difficult for the police to obtain a search warrant. *Id.,* at 426, 712 A.2d, at 579. ****2014** The Maryland Court of Appeals denied certiorari. 351 Md. 287, 718 A.2d 235 (1998). We grant certiorari and now reverse.

The Fourth Amendment generally requires police to secure a warrant before conducting a search. *California v. Carney,* 471 U.S. 386, 390-391, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). As we recognized nearly 75 years ago in *Carroll v. United States,* 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543 (1925), there is an exception to this requirement for searches of vehicles. And under our established precedent, the "automobile exception" has no separate exigency requirement. ***467** We made this clear in *United States v. Ross,* 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*" (Emphasis added.) In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car), *Pennsylvania v. Labron,* 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) *(per curiam),* we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the

Fourth Amendment ... permits police to search the vehicle without more." *Id.,* at 940, 116 S.Ct. 2485.

In this case, the Court of Special Appeals found that there was "abundant probable cause" that the car contained contraband. This finding alone satisfies the automobile exception to the Fourth Amendment's warrant requirement, a conclusion correctly reached by the trial court when it denied respondent's motion to suppress. The holding of the Court of Special Appeals that the "automobile exception" requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to our holdings in *Ross* and *Labron.* We therefore grant the petition for writ of certiorari and reverse the judgment of the Court of Special Appeals.*

It is so ordered.

***468** Justice BREYER, with whom Justice STEVENS joins, dissenting.

I agree that the Court's *per curiam* opinion correctly states the law, but because respondent's counsel is not a member of this Court's bar and did not wish to become one, respondent has not filed a brief in opposition to the petition for certiorari. I believe we should not summarily reverse in a criminal case, irrespective of the merits, where the respondent is represented by a counsel unable to file a response, without first inviting an attorney to file a brief as *amicus curiae* in response to the petition for certiorari. For this reason, I dissent.

All Citations

527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442, 67 USLW 3767, 67 USLW 3770, 67 USLW 3459, 67 USLW 3473, 1999 Daily Journal D.A.R. 6209, 1999 CJ C.A.R. 3724, 12 Fla. L. Weekly Fed. S 414

Footnotes

* Justice BREYER in dissent suggests that we should not summarily reverse a judgment in a criminal case, even though he agrees with this opinion as a matter of law. But to adopt that position would simply leave it in the hands of a respondent-who had obtained a lower court judgment manifestly wrong as a matter of federal constitutional law-to avoid summary reversal by the simple expedient of refusing to file a response. While we have on occasion appointed an attorney to file a brief as *amicus curiae* in a case where we have *granted* certiorari, in order to be sure that the argued case is fully briefed, we have never done so in cases which we have summarily reversed. The reason for this is that a summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law.

939 S.W.2d 607
Court of Criminal Appeals of Texas,
En Banc.

Kenneth Allen McDUFF, Appellant,

v.

The STATE of Texas, Appellee.

No. 71872.
|
Jan. 22, 1997.
|
Rehearing Denied Feb. 26, 1997.

Synopsis

Defendant was convicted in the District Court, Guadelupe County, Wilford Flowers, J., of capital murder and was sentenced to death. On appeal, the Court of Criminal Appeals, Overstreet, J., held that: (1) nonaccomplice evidence sufficiently connected defendant to murder to corroborate testimony of accomplice witness; (2) evidence was legally and factually sufficient to support conviction; (3) defendant lacked standing to contest reasonableness of search of automobile which he abandoned; (4) trial court did not abuse its discretion in denying defendant's proffered evidence about accomplice witness's knowledge of time of parole eligibility on life sentence; (5) prior consistent statements were admissible; (6) defendant's request to represent himself at punishment was not timely; (7) trial court was within its discretion in admitting victim impact testimony; (8) trial court was not required to define "society".

Affirmed.

Baird, J., filed concurring opinion in which McCormick, P.J., joined.

Mansfield, J., filed concurring opinion.

Attorneys and Law Firms

***610** Bill Barbisch, Austin, for appellant.

Phillip A. Nelson, Jr., Asst. Dist. Atty., Matthew Paul, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

OVERSTREET, Judge.

A Travis County grand jury indictment accused appellant of committing capital murder, specifically intentionally causing death in the course of committing and attempting to commit aggravated sexual assault and aggravated kidnapping, alleged to have occurred on or about the 29th day of December, 1991. After a change of venue, resulting in the trial being conducted in Guadalupe County, on February 23, 1994 appellant was convicted in a trial by jury of capital murder. Thereafter on March 1, 1994, based upon the jury's answers to the special issues of Article 37.071, V.A.C.C.P., appellant was sentenced ***611** to death.[1] Appellant raises 23 points of error.

I.

EVIDENCE SUFFICIENCY

In four points of error, appellant attacks the sufficiency of the evidence to support his conviction. Specifically, point of error number one claims error in overruling his motion for directed verdict. Point number two avers that the evidence is legally insufficient to support his conviction, while point three alleges factual insufficiency. Point number four claims the evidence is insufficient to corroborate accomplice testimony. These points revolve around appellant's claims that the State has not demonstrated: the corpus delicti of murder, his connection with such a crime, nor the corpus delicti of aggravated kidnapping or aggravated sexual assault.

A. TRIAL TESTIMONY

At trial, an accomplice witness testified as to appellant in late December of 1991 abducting the complainant from an Austin car wash and forcing her into the car that he and the accomplice were riding around in. The accomplice testified in some detail about appellant sexually assaulting the complainant in the backseat while the car was being driven and again on the hood of the car when they stopped the car. He testified that this even included burning her with a lit cigarette several times. The accomplice even admitted to switching places with appellant and sexually assaulting her himself. The accomplice also testified that after they had

stopped and gotten out, with appellant continuing his sexual assault, appellant slapped the complainant real hard and said something about killing her, and that after the slap she fell back and bounced on the ground; whereafter appellant picked her up and put her in the trunk of the car. The accomplice thought that the complainant was moaning, but when she was placed in the trunk and the lid closed she did not make any noise. He indicated that the slap sounded something like a crack, a tree limb or something breaking, but did not think that it broke her neck. The accomplice testified that he was then dropped off at his house and never saw the complainant again. He also testified that on the way to being dropped off appellant asked for a pocketknife and shovel and said that "he was going to use her up."

Four witnesses testified about hearing a woman's scream followed by the sound of a car door or trunk slamming coming from the same Austin car wash mentioned above on the night of December 29, 1991, and that a car then drove out of the car wash onto a one-way street the wrong way. Some of those witnesses had previously seen that same car in that same area with two men inside a few minutes earlier that night driving the wrong way on another nearby one-way street. One of the witnesses identified appellant as the driver of that car leaving the car wash. The complainant's unoccupied soap-sudded car was then found at the otherwise deserted car wash with her keys and purse and some perishable groceries inside.

The complainant's boyfriend testified that on the night of December 29, 1991, he spoke with her on the phone and she said that she wanted to go wash her car that night. Her sister testified that since that night, there had been no activity in the complainant's bank and charge accounts that could be attributed to the complainant. The sister also indicated that there was no indication from the items remaining in her apartment that she was going on a trip. She was unaware of any problems that the complainant might have been going through that would possibly cause her to disappear or just walk off and leave everything.

A Department of Public Safety (DPS) serologist testified that appellant's car, which he had been seen pushing into and leaving in a Waco motel parking lot on March 1, 1992, and some items therein were found to contain small amounts of human blood. There was also testimony from a DPS criminologist that five hairs recovered from appellant's car matched up microscopically to the known ***612** hair of the complainant, i.e. each of the five hairs had the same microscopic characteristics as the hair that was known to be the complainant's.

A minister/supervisor for a Kansas City, Missouri rescue mission shelter for homeless men testified that appellant had checked into the shelter on March 17, 1992 using an alias name. There was testimony that appellant was arrested on May 4, 1992 in Kansas City, Missouri as he was working using an alias name with alias identification.

B. ACCOMPLICE WITNESS INSUFFICIENCY CLAIM

Point of error number four avers that "the evidence is insufficient to corroborate accomplice testimony." Article 38.14, V.A.C.C.P., provides, "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." The test for sufficient corroboration is to eliminate from consideration the accomplice testimony and then examine the other inculpatory evidence to ascertain whether the remaining evidence tends to connect the defendant with the offense. *Burks v. State,* 876 S.W.2d 877, 887 (Tex.Cr.App.1994), *cert. denied,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995). In order to determine whether the accomplice witness testimony is corroborated, we eliminate all accomplice evidence and determine whether the other inculpatory facts and circumstances in evidence tend to connect appellant to the offense. *Munoz v. State,* 853 S.W.2d 558, 559 (Tex.Cr.App.1993). We shall accordingly eliminate the accomplice witness testimony from our consideration and then conduct such an examination without considering the accomplice witness testimony.

Appellant points to the lack of non-accomplice eyewitness testimony to the alleged killing, and the absence of a body or definite cause of death. He insists that absent the accomplice testimony, there is no evidence of the complainant's death, "except that she was abducted and has not returned." He also points out that hearsay from an accomplice cannot corroborate the accomplice's trial testimony, i.e. an accomplice cannot corroborate himself by his own statements made to third persons. *Reynolds v. State,* 489 S.W.2d 866, 872 (Tex.Cr.App.1972); *Brown v. State,* 167 Tex.Crim. 352, 320 S.W.2d 845 (1959); and *see also Beathard v. State,* 767 S.W.2d 423, 429 (Tex.Cr.App.1989).

As noted above, there was trial testimony from a nonaccomplice witness that on the evening of December 29, 1991 appellant was seen driving a car out of the car wash shortly after a woman's scream and the sound of a car door or trunk slamming had been heard coming from the car wash. Non-accomplice witnesses also testified that shortly thereafter the complainant's unoccupied soap-sudded car was found abandoned at the otherwise deserted car wash with her keys and purse and some perishable groceries inside. Non-accomplice testimony also indicated that the same car that appellant was identified as driving out of the car wash after the scream and door or trunk slam had been seen, occupied by two men, driving around in the neighborhood shortly before the incident at the car wash.

Motel employees testified about appellant pushing his car into the motel parking lot and that it was left there. A DPS criminologist testified that five hairs recovered from appellant's car matched up microscopically to the known hair of the complainant, i.e. each of the five hairs had the same microscopic characteristics as the hair that was known to be the complainant's. One of those hairs was recovered from the carpet in the trunk, while the others were recovered from the backseat area and a back floorboard mat. Also several items found inside appellant's car, including carpeting on the back floor area, a cowboy hat, bed sheets, and a shirt, were found to contain small amounts of human blood; however, based upon the blood the complainant could not be included nor excluded from having been in the car.

One of the accomplice's sisters, with whom the accomplice had been staying in 1991, testified that on an evening between Christmas and New Year's Eve of 1991, a car that ***613** appeared to be appellant's pulled up at her home in Belton and that the accomplice left with the explanation that he and appellant were going to have a couple of drinks. She further testified that the accomplice returned home after midnight that night but she could not describe the vehicle that dropped him off there. An acquaintance of appellant's testified about them riding around Austin on Christmas Day of 1991 looking for a particular prostitute, whereupon appellant suggested just taking a young girl who was outside roller-skating.

The non-accomplice evidence does not have to directly link appellant to the crime, nor does it alone have to establish his guilt beyond a reasonable doubt; but rather, the non-accomplice evidence merely has to tend to connect appellant to the offense. *Burks v. State,* 876 S.W.2d at 888. Thus there must simply be *some* non-accomplice evidence which *tends* to connect appellant to the commission of the offense alleged in the indictment. *Gill v. State,* 873 S.W.2d 45, 48 (Tex.Cr.App.1994). The accomplice witness testimony in a capital murder case does not require corroboration concerning the elements of the aggravating offense, i.e. the elements which distinguish murder from capital murder. *Gosch v. State,* 829 S.W.2d 775, 777 n. 2 (Tex.Cr.App.1991), *cert. denied,* 509 U.S. 922, 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993); *May v. State,* 738 S.W.2d 261, 266 (Tex.Cr.App.1987), *cert. denied,* 484 U.S. 1079, 108 S.Ct. 1059, 98 L.Ed.2d 1020 (1988); *Anderson v. State,* 717 S.W.2d 622, 631 (Tex.Cr.App.1986), *cert. dismissed,* 496 U.S. 944, 110 S.Ct. 3232, 110 L.Ed.2d 678 (1990); *Romero v. State,* 716 S.W.2d 519, 520 (Tex.Cr.App.1986), *cert. denied,* 479 U.S. 1070, 107 S.Ct. 963, 93 L.Ed.2d 1011 (1987). Evidence that the defendant was in the company of the accomplice at or near the time or place of the offense is proper corroborating evidence. *Cockrum v. State,* 758 S.W.2d 577, 581 (Tex.Cr.App.1988), *cert. denied,* 489 U.S. 1072, 109 S.Ct. 1358, 103 L.Ed.2d 825 (1989); and *Burks v. State,* 876 S.W.2d at 887–88.

After eliminating the accomplice witness testimony from our consideration and conducting an examination of the non-accomplice evidence, we conclude that such non-accomplice evidence does indeed tend to connect appellant to the offense sufficiently to corroborate the testimony of the accomplice witness. Accordingly, we overrule point four.

C. GENERAL INSUFFICIENCY CLAIMS

Point of error number three avers that "the evidence is factually insufficient to support appellant's conviction." Appellant generally discusses the evidence for points one through four together in his brief, but does not propose a standard of reviewing factual sufficiency in a capital case or specifically argue how the evidence is insufficient under any standard of reviewing factual sufficiency. *See, e.g., Clewis v. State,* 922 S.W.2d 126 (Tex.Cr.App.1996); *White v. State,* 890 S.W.2d 131 (Tex.App.—Texarkana 1994, pet. pending); *Stone v. State,* 823 S.W.2d 375 (Tex.App.—Austin 1992, pet. ref'd, untimely filed). He simply begins his discussion of points one through four by stating, "In reviewing for factual sufficiency the court considers whether the judgment is so against the great weight and preponderance of the evidence as to be manifestly unjust[,]" and concludes by stating, "In the alternative, appellant asserts that his conviction is against the great weight and preponderance of the evidence and that his conviction should be reversed and a new trial ordered."

We conclude that point number three is insufficiently briefed, presents nothing for review. Tex.R.App.Pro. 74(f) and 210(b). Also, after reviewing the evidence under the *Clewis* standard, we conclude that the verdict is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. Point three is hereby overruled.

Point number one claims error in overruling his motion for directed verdict, while point two alleges that the evidence is legally insufficient to support his conviction. Since a complaint about overruling a motion for directed/instructed verdict is in actuality an attack upon the sufficiency of evidence to sustain the conviction, we shall address and dispose of points one and two together. *Cook v. State,* 858 S.W.2d 467, 469–70 (Tex.Cr.App.1993).

***614** Appellant insists that there are no prosecutions for murder in the absence of 1) a body or remains, 2) a confession, and/or 3) non-accomplice testimony of death and cause of death; i.e. where there is no body, no confession, and no non-accomplice testimony of the death and cause of death, there is a failure of proof of the corpus delicti of homicide. He also insists that the State has failed to show the corpus delicti of either murder, aggravated kidnapping, or aggravated sexual assault.

The corpus delicti of a crime simply consists of the fact that the crime in question has been committed by someone; specifically, the corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another, and the State is not required to produce and identify the body or remains of the decedent. *Fisher v. State,* 851 S.W.2d 298, 303 (Tex.Cr.App.1993). Thus, in the instant cause, the State must show the death of the named complainant caused by the criminal act of appellant.

Appellant insists that in the absence of a body or remains or a confession, such mandatory showing of corpus delicti must be made via non-accomplice testimony of death and cause of death. He opines that since there is no body to autopsy, a definitive determination of death and cause of death is not possible. He also suggests that if accomplice testimony can be utilized to establish the cause of death, such must be corroborated, though he acknowledges that the standard for corroboration of accomplice testimony to prove corpus delicti is unknown.

We do not find appellant's assertions persuasive. We see no reason to exclude accomplice witness testimony in determining whether the corpus delicti has been established. Appellant is unable to cite any constitutional, statutory, or caselaw requirement that accomplice witness testimony be corroborated before it can be considered in determining whether the corpus delicti has been established, thus we decline to require such corroboration in making such a determination. Accordingly, in resolving appellant's points of error claiming legal insufficiency of evidence to prove corpus delicti, we shall consider all of the evidence, including accomplice witness testimony. We note that in evaluating the legal sufficiency of evidence of guilt, we must consider *all* of the evidence. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). This includes the accomplice witness testimony. In making such evaluation, we must view *all* of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Accordingly, we evaluate appellant's legal insufficiency claims in view of *all* of the evidence in such requisite light.

The indictment in the instant cause included a count alleging capital murder via murder in the course of committing and attempting to commit aggravated sexual assault and aggravated kidnapping. The jury charge authorized conviction of capital murder if it found that appellant intentionally caused the death of the complainant in the course of committing or attempting to commit aggravated sexual assault or aggravated kidnapping.[2] The jury returned a general verdict of "guilty of the offense of capital murder." When a general verdict is returned and the evidence is sufficient to support a finding of guilt under any of the paragraph allegations submitted, the verdict will be upheld. *Rabbani v. State,* 847 S.W.2d 555, 558 (Tex.Cr.App.1992), *cert. denied,* 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 731 (1993); *Fuller v. State,* 827 S.W.2d 919, 931 (Tex.Cr.App.1992), *cert. denied,* 509 U.S. 922, 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993). Thus if the evidence is sufficient to support the allegation of murder during the course of aggravated kidnapping, then the guilty verdict shall be upheld.

***615** As discussed above, the corpus delicti of a crime simply consists of the fact that the crime in question has been committed by someone; specifically, the corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another. As also discussed above, the accomplice witness testified about being present in late December of 1991 when appellant

forcibly abducted the complainant from an Austin car wash, and then sexually assaulted her, while the complainant's unoccupied soap-sudded car was found abandoned at the otherwise deserted car wash with her keys and purse and some perishable groceries inside shortly after witnesses testified that they had heard a woman's scream and a car door or trunk slamming sound coming from the car wash and a witness had seen a man, subsequently identified as appellant, driving out of the car wash. Viewing the evidence in the requisite favorable light, we conclude that such establishes the corpus delicti of aggravated kidnapping. V.T.C.A. Penal Code, § 20.04. We also note that the jury charge, pursuant to the indictment and V.T.C.A. Penal Code, § 19.03(a)(2), authorized conviction of capital murder for murder in the course of committing "or attempting to commit" aggravated kidnapping.

As discussed above, the corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another, and the State is not required to produce and identify the body or remains of the decedent. The accomplice witness testified as to appellant striking the complainant with such force that it bounced her on the ground and sounded something like a crack, a tree limb or something breaking, and placed her limp body in the trunk of his car; and that after striking that blow appellant burned her two or three times with a cigarette but got no response other than perhaps moaning. He also indicated that appellant mentioned killing her and using her up, and asked for a pocketknife and shovel. Another witness testified that while riding around appellant had pointed out places, like around a bridge or tree or gully or oil well, that would be good to bury somebody or dump a body or get rid of somebody, though it was understood that he was referring to getting revenge against a guy who had killed appellant's brother some years before.

The accomplice witness testified as to the difference in stature between appellant, at over six-feet tall, and the complainant, appearing to be a good foot shorter. An exhibit admitted into evidence, a flier announcing the complainant's disappearance, described her as five-foot three-inches tall and weighing one-hundred fifteen pounds. A forensic pathologist testified that a blow from the hand of a person of some size delivered to the head of a person five-foot three-inches tall and weighing one-hundred fifteen pounds which sounded like a tree limb breaking, which resulted in the recipient of the blow being knocked back and bouncing off the ground and being carried limp with legs and feet dangling, indicates that something major has broken with the limpness indicating that there was probably spinal cord damage as well; and not appropriately responding to cigarette burns thereafter further indicates neurological pathway damage without possible recovery such that life is going to be lost very quickly.

As discussed earlier, the complainant's sister indicated that since the complainant had disappeared, she had not seen or heard from the complainant and there had been no activity in her bank and charge accounts that could be attributed to the her, nor was there any indication from the items remaining in her apartment that she was going on a trip. The sister was unaware of any problems that the complainant might have been going through that would possibly cause her to disappear or just walk off and leave everything. The sister also indicated that she and the complainant tried to talk on the phone once or twice a week or at least leave messages on each other's answering machines.

Viewing this evidence and the previously discussed evidence of blood and hairs found in appellant's car in the requisite light, we conclude that there is sufficient evidence of the corpus delicti of murder, i.e. evidence showing the death of a human being caused by the criminal act of another. We conclude that a rational trier of fact could have found ***616** the essential elements of the crime beyond a reasonable doubt. Accordingly, points one and two are overruled.

II. EVIDENCE ADMISSIBILITY

A. SEARCH AND SEIZURE

Points ten, eleven and twelve claim error in failing to suppress evidence seized in three separate searches of appellant's car. These items included personal papers bearing appellant's name, a wallet, hairs, clothing, and bloody spots on the car's carpeting. Point ten refers to the March 12, 1992 search; point eleven refers to the April 2, 1992 search; and point twelve refers to the May 19, 1992 search. Appellant unsuccessfully sought to suppress various items seized from his car during the three searches; his pretrial suppression motions were overruled.

The State suggests that appellant had abandoned the car and forsaken any reasonable expectation of privacy therein. Appellant claims that since this abandonment argument was not made by the State in the trial court, such should not now be heard. However, a reviewing court "may properly sustain

the trial court's denial on the ground that the evidence failed to establish standing as a matter of law, even though the record does not reflect that the issue was ever considered by the parties or the trial court." *Wilson v. State,* 692 S.W.2d 661, 671 (Tex.Cr.App.1984) (op. on reh'g). There is a lack of standing to contest the reasonableness of the search of abandoned property.

At the pretrial hearing, there was testimony that motel employees had first noticed the car in the early morning hours of March 1, 1992 and subsequently contacted the sheriff's department wanting it removed because it was partially blocking their truck parking area—it was parked out in the middle of the lot. At police direction, it was towed from the motel parking lot on March 6, 1992. Thus it had been there unattended for 6 days. An affidavit supporting the April 2 search warrant, which was offered and admitted into evidence for purposes of the hearing, indicated that appellant had been positively identified as the man seen using another car in pushing this car into the parking lot of the motel during the early morning hours of March 1, 1992, and that as a result of the car being left there for several days and no one moving it, the motel owners wanted it moved off the property.

Abandonment of property occurs if the defendant intended to abandon the property and his decision to abandon it was not due to police misconduct. *Brimage v. State,* 918 S.W.2d 466, 507 (Tex.Cr.App.1996), *cert. filed,* May 29, 1996; *Comer v. State,* 754 S.W.2d 656, 659 (Tex.Cr.App.1986). When police take possession of property abandoned independent of police misconduct there is no seizure under the Fourth Amendment. *Hawkins v. State,* 758 S.W.2d 255, 257 (Tex.Cr.App.1988); *Clapp v. State,* 639 S.W.2d 949, 953 (Tex.Cr.App.1982). This Court has spoken approvingly of language in *U.S. v. Colbert,* 474 F.2d 174 (5th Cir.1973) (en banc), which discussed how abandonment is primarily a question of intent to be inferred from words spoken, acts done, and other objective facts and relevant circumstances, with the issue not being in the strict property-right sense, but rather whether the accused had voluntarily discarded, left behind, or otherwise relinquished his interest in the property so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. *Sullivan v. State,* 564 S.W.2d 698 (Tex.Cr.App.1978) (op. on reh'g); *Smith v. State,* 530 S.W.2d 827, 833 (Tex.Cr.App.1975).

Appellant pushed the car into the motel parking lot. There is no evidence that there was any police involvement at all in his doing so. Thus we must determine whether appellant's pushing the car there and leaving it for several days evidences an intent to abandon it.

We note that TEX.REV.CIV.STAT.ANN. art. 4477–9a, § 5.01(2) (Vernon Supp.1992), *repealed* effective September 1, 1995, and *replaced by* V.A.T.C. Transp. Code, § 683.002, defines "Abandoned motor vehicle" to include "a motor vehicle that has remained on private property without the consent of the owner or person in control of the property for more than 48 hours[.]" Such definition applies specifically to the ***617** Texas Abandoned Motor Vehicles Act and is thus not dispositive on general search and seizure issues, but can be instructive in our determination of appellant's intent in leaving his car.

As discussed above, appellant had left the car in the motel parking lot for several days, apparently voluntarily and without any police involvement. Leaving it for six days, nearly a week from March 1 through March 6, is some evidence of intent to not retrieve the car. Also appellant driving another car to push this car into the parking lot is some indicia that appellant had possession of another operable vehicle. The affidavit supporting the May 18 search warrant indicated that appellant did not return to his school classes on March 2, 1992 and was subsequently found living under alias names in Kansas City, Missouri on May 4, 1992. The Abandoned Motor Vehicles Act includes provisions for police to take an abandoned vehicle into custody, and for police department use and auction of such vehicles. Such statutory potential disposition of a vehicle contemplates possible loss of possession and ownership and concomitant privacy interests.

We point out that leaving a car unattended such as to be included within the Art. 4477–9a, § 5.01(2) definition does not automatically mean "abandonment" in terms of a Fourth Amendment privacy interest. Each situation must be analyzed and evaluated on a case-by-case basis, with the particular facts of each situation determinative. In the instant case, we conclude that there is sufficient evidence of abandonment, i.e. that appellant intended to abandon the car and his decision to abandon it was not due to police misconduct. Accordingly, the trial court did not err in denying appellant's motions to suppress the evidence obtained from the car. Accordingly, we overrule points ten, eleven and twelve.

B. EVIDENCE EXCLUSION

Point number thirteen alleges that "the trial court erred in barring defense counsel from cross[-]examining the accomplice witness on his knowledge of the 35 year mandatory minimum sentence applicable to life for capital murder." Appellant insists that the accomplice's knowledge of the mandatory minimum sentence that he would have to serve on a life sentence for aggravated kidnapping, 15 years, as opposed to the mandatory minimum on a life sentence for capital murder, 35 years, was necessary in order to inquire into his incentive to testify favorably for the State against appellant.

While exposing a witness's motivation to testify against a defendant is a proper and important function of the constitutionally protected right to cross-examination, and the defendant is allowed great latitude to show any fact which would tend to establish ill feeling, bias, motive, and animus on the part of the witness testifying against him, this right does not prevent a trial court from imposing some limits on the cross-examination into the bias of a witness. *Miller v. State,* 741 S.W.2d 382, 389 (Tex.Cr.App.1987), *cert. denied,* 486 U.S. 1061, 108 S.Ct. 2835, 100 L.Ed.2d 935 (1988). Of course, within reason, the trial judge should allow the accused great latitude to show any relevant fact that might affect the witness's credibility. *Virts v. State,* 739 S.W.2d 25, 29 (Tex.Cr.App.1987).

Appellant sought to question the accomplice witness about his knowledge of the difference between the parole eligibility time period on a life sentence for one convicted of capital murder versus one convicted of aggravated kidnapping or aggravated robbery; however he made no showing that that witness had been convicted of, or made a plea agreement for conviction of, any offense. Appellant also failed to show that the accomplice witness had made any type of plea agreement for any sentence, life or otherwise. Appellant was permitted to question him about any possible agreements, and the accomplice witness insisted that no one had made any offers to him and that there were no agreements or deals for his testimony, other than testimonial immunity, i.e. that his testimony in appellant's trial could not be used against the accomplice witness in his own trial.

The parameters of cross-examination for a showing of witness bias rests within the sound discretion of the trial court. ***618** *Chambers v. State,* 866 S.W.2d 9, 27 (Tex.Cr.App.1993), *cert. denied,* 511 U.S. 1100, 114 S.Ct. 1871, 128 L.Ed.2d 491 (1994). In *Carroll v. State,* 916 S.W.2d 494 (Tex.Cr.App.1996), we held that a trial court erred in precluding a defendant's cross-examination inquiring into a witness's incarceration, pending charge, and possible punishment as a habitual criminal, because such cross-examination was appropriate to demonstrate the witness's potential motive, bias or interest to testify for the State, and to show that the witness had a vulnerable relationship with the State at the time of his testimony.

In this case, as noted above, appellant was permitted to question the accomplice witness about any possible agreements, and the accomplice witness insisted that no one had made any offers to him and that there were no agreements or deals for his testimony, other than testimonial immunity. Thus, appellant was permitted to demonstrate the accomplice's vulnerable relationship with the State and potential motive, bias or interest. Therefore appellant was able to show that since the accomplice witness had the serious pending charges, he was at least potentially beholden to some extent to the State for the disposition of those charges and that such situation might have affected his testimony as a witness for the State. Allowing him to elicit the accomplice witness's knowledge or lack of knowledge of the difference in parole eligibility minimum time periods would not have any further shown his vulnerable relationship with the State or his potential motive, bias or interest.

In the instant case, based upon the cross-examination that was allowed, we conclude that the trial court did not abuse its discretion in denying appellant's proffered evidence about the accomplice witness's knowledge of the time of parole eligibility on life sentences. Accordingly, we overrule point number thirteen.

C. EVIDENCE ADMISSION

Points five and six aver error in allowing certain testimony of witnesses Pierce and Smith over objections that such testimony was irrelevant on an issue other than character conformity and that the testimony was more prejudicial than probative. Point five deals with Pierce's testimony about appellant suggesting that they take a young 12 or 13–year old girl who was outside roller-skating, while point six involves Smith's testimony about appellant pointing out places that would be good to bury somebody or dump a body or get rid of somebody.

Appellant insists that such testimony from these two witnesses was inadmissible character conformity evidence

as being outside the scope of Tex.R.Crim.Evid. 404(b) and is more prejudicial than probative in contravention of Tex.R.Crim.Evid. 403. The State points out that it had a compelling need to meet its legal burden of corroboration of the accomplice witness's testimony. Rule 404(b) explicitly precludes admission of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show that he acted in conformity therewith; however, it does allow for the admission of such evidence for other purposes.

After opening statements, outside the presence of the jury the trial court announced it was having "a hearing on the motion in limine." Four witnesses testified, including Pierce and Smith. Appellant made his objections to the various witnesses and the trial court overruled the objections. One of the prosecutors had even commented, "We kind of ran through several of the motions in limine." Then in the presence of the jury, when witnesses Pierce and Smith testified, appellant failed to object to their testimony.

It is well-settled that the denial of a motion in limine is not sufficient to preserve error for review, but rather there must be a proper objection to the proffered evidence. *Basham v. State,* 608 S.W.2d 677, 679 (Tex.Cr.App.1980); *Romo v. State,* 577 S.W.2d 251 (Tex.Cr.App.1979). Thus, appellant by failing to object to the proffered testimony of Pierce and Smith failed to preserve his claims for review. Accordingly, we overrule points five and six.

Points seven, eight, eight-A, and nine allege error in admitting, over objection, hearsay testimony from four witnesses regarding statements that the accomplice had made to them. Point seven, refers to testimony of witness Dupuis; point eight refers ***619** to testimony of witness Mr. Bedrich; and point eight-A refers to testimony of witness Mrs. Bedrich. At a New Year's Eve 1991 party, these three witnesses testified that the accomplice had made a statement to them wondering what they would do if they saw someone being mistreated but couldn't do anything about it. He also complains about testimony from Mr. Bedrich about the accomplice having asked about whether he had heard about the woman missing from the Austin car wash and saying that appellant had done it, but that he was afraid to tell anybody for fear of being killed, and that there were noises coming from the trunk of a car that were inconsistent with a new car. Point nine deals with testimony from Officer Steglich as to the accomplice having told him about having been with appellant when he took the girl from the car wash, spent time with appellant in a secluded area, and appellant having dropped him off at his trailer park.

The objected-to testimony was elicited after the accomplice witness had testified. The State suggests that such was admissible pursuant to Tex.R.Crim.Evid. 801(e)(1)(B) as prior consistent statements. Appellant responds that since such was proffered at trial under the Tex.R.Crim.Evid. 803(24) statement against interest hearsay exception the State should not be allowed to bring forth a new theory for admissibility on appeal. However, it is well-settled that a trial court's decision will be sustained if it is correct on any theory of law applicable to the case, especially with regard to the admission of evidence. *Romero v. State,* 800 S.W.2d 539, 543 (Tex.Cr.App.1990).

Rule 801(e)(1)(B) provides that a statement made by a declarant who testifies at trial and is subject to cross-examination concerning the statement is not hearsay if it is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. It also requires that a prior consistent statement be made before the alleged improper influence or motive arose. *Haughton v. State,* 805 S.W.2d 405, 408 (Tex.Cr.App.1990). Appellant's brief and supplements do not argue that the requirements of Rule 801(e)(1)(B) have not been met. After reviewing the accomplice witness's testimony, we conclude that the above-described complained-of testimony is within the parameters of Rule 801(e)(1)(B). We therefore overrule points seven, eight, eight-A, and nine.

III.

PUNISHMENT CLAIMS

Point number fourteen avers error in refusing appellant's request to represent himself at the punishment phase. At the beginning of the punishment phase, prior to the presentation of evidence and the reading of the enhancement allegations, appellant stated that wanted to represent himself at punishment. The stated reason was because of a dispute with trial counsel over strategy in cross-examining and presenting witnesses. After extensive discussions and consideration, the trial court denied appellant's request for self-representation.

An accused's right to self-representation must be asserted in a timely manner, namely, before the jury is impaneled. *Ex parte Winton,* 837 S.W.2d 134, 135 (Tex.Cr.App.1992); *Blankenship v. State,* 673 S.W.2d 578,

585 (Tex.Cr.App.1984). Since appellant's request was long after the jury had been impaneled, such request was not timely. We therefore overrule point fourteen.

Point fifteen claims error in admitting victim impact evidence at punishment. Upon the State announcing that the complainant's sister would be the next witness for victim impact evidence, outside the presence of the jury it made such a proffer and appellant objected to the introduction of such evidence. The trial court stated that it was going to allow the testimony in, and approved of appellant not having to object again in the presence of the jury if the testimony was substantially the same.

Before the jury the complainant's sister testified about the effects of this offense on her children and her sisters, including how her recent marriage had broken up shortly after the complainant disappeared. She described how she now had a lot of fears, ***620** especially to go out at night alone. She also described what she missed most about the complainant—not being able to talk to her, and her acceptance and love. She also stated that it was very important to her and her family to get the complainant's remains back and to have a proper funeral and bury her in sacred ground on their family plot.

We have recently discussed the admissibility of so-called "victim impact" evidence. *Ford v. State,* 919 S.W.2d 107, 112–16 (Tex.Cr.App.1996); *Smith v. State,* 919 S.W.2d 96, 97–103 (Tex.Cr.App.1996), *cert. filed,* July 9, 1996. Admissibility is determined by the terms of the Rules of Criminal Evidence, particularly whether such evidence is relevant to the statutory special issues. Such questions of relevance should be left largely to the trial court, to be reviewed under an abuse of discretion standard. *Ford, supra.*

The jury was required to answer a punishment special issue which asked about appellant's moral culpability. Committing a murder and disposing of the body such that it is not located and thus depriving the surviving family of the ability to bury the decedent certainly seems to be a factor in assessing one's moral culpability. Also, the effects of a murder causing the decedent's sister to have fears, particularly going out at night alone, would also appear to be a legitimate factor in assessing one's moral culpability. These effects arising from such a murder are certainly foreseeable and to commit such a murder in disregard of these effects on survivors seems to go to the perpetrator's moral culpability for such acts. The other testimony, regarding how the decedent's sister's marriage broke up after the disappearance and missing the decedent's love and not being able to talk to her, seems to be more tenuously tied to appellant's moral culpability. Such seem to be less foreseeable after-effects of such a murder and it is more questionable whether such fall within the parameters of admissible "victim impact" evidence.

We also note that the decedent's sister's testimony in this case did not go to the decedent's character, i.e. the testimony did not attempt to show that appellant was more deathworthy because of who he killed and the character of the decedent. As in *Ford,* we conclude that the trial court was within its discretion in admitting such evidence as relevant to the punishment special issues. Accordingly, we overrule point number fifteen.

Points sixteen, seventeen, and eighteen allege Eighth and Fourteenth Amendment constitutional violations for failure to define "society." Appellant suggests that since the jury charge included an instruction on the fact that a person assessed a life sentence for capital murder would have to serve 35 years before being eligible for parole, in order to be guided in its deliberations on future dangerousness the jury needed to be informed that society includes not only free citizens but also inmates in the penitentiary. He also points out that during deliberations the jury inquired with a note explicitly asking for a definition of society. We have repeatedly held that there was no error in refusing to define such a term. *Burks v. State,* 876 S.W.2d 877, 910–11 (Tex.Cr.App.1994), *cert. denied,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *Camacho v. State,* 864 S.W.2d 524, 536 (Tex.Cr.App.1993), *cert. denied,* 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994). We find no cause to depart from our prior holdings. Accordingly points sixteen, seventeen, and eighteen are overruled.

Point twenty avers error in barring evidence of the 35 year mandatory minimum parole eligibility statute. The trial court did include a jury charge instruction stating, "A prisoner serving a life sentence for a capital felony is not eligible for release on parole until the actual calendar time the prisoner has served equals 35 calendar years." Since such constituted precisely the same information via legal instruction rather than testimonial evidence, we find no error in the trial court's decision to exclude the proffered evidence but include the above-quoted instruction. Point twenty is hereby overruled.

In point nineteen appellant complains of the unduly restrictive definition of mitigating evidence in Article 37.071, V.A.C.C.P. He insists that such definition unduly narrows

the range of evidence that may be taken into ***621** account in determining whether to assess a life or death sentence. Appellant challenges Art. 37.071, § 2(f)(4)'s provisions that jurors shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness. He insists that such definition limits what may be considered by the jury to evidence that a juror might regard as reducing the defendant's blameworthiness and "excluded from consideration that the defendant will have to serve the balance of his life in prison if given a life sentence." However, as noted by the above-quoted instruction, appellant would have been eligible for parole on a life sentence in 35 years rather than being *required* to serve the balance of his life in prison. Other than this claim, appellant merely states generally that the jury's consideration of mitigating evidence was restricted, but he does not specify what other evidence he presented which was mitigating but the jury was unable to consider. We find appellant's claim unpersuasive. Point nineteen is overruled.

Point number twenty-one claims that his conviction and death sentence violate the double jeopardy protections of the U.S. and Texas Constitutions because the facts of the instant case were admitted into evidence as unadjudicated offense evidence at the punishment phase of a previous capital murder trial to secure the death penalty against him. This Court has held that in such a situation the double jeopardy provisions are not implicated and not violated because the previous punishment was for the charged offense rather than the extraneous offense. *Ex parte Broxton,* 888 S.W.2d 23, 28 (Tex.Cr.App.1994), *cert. denied,* 515 U.S. 1145, 115 S.Ct. 2584, 132 L.Ed.2d 833 (1995). Accordingly, point twenty-one is overruled.

Point twenty-two asserts that allowing evidence of kidnapping to prove both murder and the aggravating element to raise it to capital murder is an improper use of the capital murder statute. He insists that using evidence of kidnapping twice, once to prove murder and again to show capital murder, i.e. a double use of kidnapping, is an improper application of the capital murder statute. Appellant does not present any constitutional or statutory authority against murder in the course of committing or attempting to commit kidnapping being "elevated" to capital murder. We find such to be inadequately briefed and overruled point twenty-two. Tex.R.App.Pro. 74(f) and 210(b).

Point twenty-three asserts that the use of evidence of kidnapping to prove both murder and the aggravating element raising it to capital murder violates the Eighth Amendment in failing to limit the class of "death eligible" offenders. He acknowledges that the V.T.C.A. Penal Code, § 19.03(a)(2) "in the course of" offenses "perform the necessary function of narrowing those class of murders which can merit a capital conviction and sentence." However, he insists that in the present case murder is proved by evidence of kidnapping and no return, while kidnaping is then proved again to raise the murder to a capital offense, with kidnapping performing no narrowing of the class of death eligible offenses, thus resulting in a violation of the Eighth Amendment of the U.S. Constitution. The Texas capital murder scheme sufficiently narrows the class of death-eligible defendants. *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Appellant's argument that it is not sufficient in his case is not persuasive. Point twenty-three is overruled.

After reviewing and overruling all of appellant's points of error, his conviction and sentence are hereby affirmed.

BAIRD, Judge,[*] concurring.

I write separately to more fully discuss the sufficiency of the evidence to establish murder in the absence of the victim's body. In points of error one and two, appellant contends the evidence is legally insufficient to prove the *corpus delicti* of the murder since no body was produced and there was neither a confession by appellant nor non-accomplice testimony establishing the death. Appellant further contends that if accomplice witness testimony is utilized to establish *corpus delicti,* it must be corroborated.

***622** I.

The *corpus delicti* of any crime "simply consists of the fact that the crime in question has been committed by someone." *Fisher v. State,* 851 S.W.2d 298, 303 (Tex.Cr.App.1993). The *corpus* delicti essentially embraces all of the elements of the crime except the participation of the defendant:

> the *corpus delicti* [of a crime] embraces the fact ... that somebody did the required act or omission with the required mental fault, under the required (if any) attendant circumstances, and producing the required (if any) harmful consequence, without embracing the further fact (needed for conviction) that the defendant was the one who did or omitted that act or was otherwise responsible therefor.

Id. (quoting 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.4 at 24 (2nd ed. 1986)). Proof of the *corpus delicti* may not be made by the defendant's extrajudicial confession alone, but proof of the *corpus delicti* need not be made independent of the extrajudicial confession. If there is some evidence corroborating the confession, the confession may be used to aid in the establishment of the *corpus delicti*. *Self v. State,* 513 S.W.2d 832, 835 (Tex.Cr.App.1974). On the other hand, a conviction may not be based upon an accomplice witness' testimony unless corroborated by other evidence tending to connect the defendant with the offense committed. Tex.Code Crim.Proc.Ann. art. 38.14.

In the context of murder, the State was previously required to produce and identify a body or remains in order to prove the *corpus delicti.* Article 1204 of the 1925 Penal Code provided:

> No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed.

This provision can be traced to the first codification of criminal and civil laws of the Republic of Texas, and was founded upon a desire to avoid the swift execution of a potentially innocent person, particularly on the rugged frontier where the alleged deceased might have simply moved on to another place, never to be seen again. *See,* Walter W. Steele, Jr. & Ruth A. Kollman, *The Corpus Delicti of Murder After Repeal of Article 1204,* Voice for the Defense 10, 11 (June 1991) (drafters apparently concluded "that the vicissitudes of life on an enormous frontier required particular safeguards against the conviction and execution of innocent persons" and one of such safeguards was the body requirement). *See also, Puryear v. State,* 28 Tex.App. 73, 11 S.W. 929, 931 (1889) (Texas provision inspired by desire to avoid conviction and punishment of innocent persons, stating "we could cite hundreds of cases in which the innocent have been punished under the old rule, which did not require the body or a portion of it, to be found.").

This view was never adopted by the English common law. *See e.g., Puryear,* 11 S.W. at 931 (a common law conviction for murder could be sustained upon testimony of witness without production of body); Wheeler, *Invitation to Murder,* 30 S. Tex.L.Rev. at 276 (circumstantial evidence sufficient to establish death in common law). And Texas appears to have been the only state to have enacted such a provision. While some states adopted less radical rules, requiring "direct proof" of the *corpus delicti* of death, even those provisions have long been repealed. Wheeler, *Invitation to Murder,* 30 S.Tex.L.Rev. at 276 (Montana, New York, North Dakota identified as having statutes requiring proof of death by direct evidence, but those provisions now repealed).

Article 1204 was repealed by the Texas Legislature with the passage of the 1974 Penal Code. *Fisher,* 851 S.W.2d at 303. While we have referred a number of times to its repeal, we have never purported to know the impetus therefor. *Id., Streetman v. State,* 698 S.W.2d 132, 134–35, n. 1 (Tex.Cr.App.1985); *Easley v. State,* 564 S.W.2d 742, 747 (Tex.Cr.App.), *cert. denied,* 439 U.S. 967, 99 S.Ct. 456, 58 L.Ed.2d 425 (1978); *Valore v. State,* 545 S.W.2d 477, 479 n. 1 (Tex.Crim.App.1977). Nevertheless, the demise of article 1204 is consistent with prevailing legal views.

The notion that the careful and meticulous murderer might escape punishment by destroying ***623** or forever concealing the body of his victim is a distasteful one:

> The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an acquittal. That is one form of success for which society has no reward.

Epperly v. Commonwealth, 224 Va. 214, 294 S.E.2d 882, 891 (1982) (quoting *People v. Manson,* 71 Cal.App.3d 1, 139 Cal.Rptr. 275, 298 (1977), victim's body never found); *see also, State v. Zarinsky,* 143 N.J.Super. 35, 362 A.2d 611, 621 (App.Div.1976) (concealment or destruction of victim's body should not preclude prosecution where proof of guilt can be established beyond reasonable doubt), *aff'd,* 75 N.J. 101, 380 A.2d 685 (1977); *and, People v. Lipsky,* 57 N.Y.2d 560, 457 N.Y.S.2d 451, 456, 443 N.E.2d 925, 930 (1982) (no hesitancy overruling common law rule requiring direct proof of death in murder case as such rule rewards professional or meticulous killer). *See generally,* Wheeler, *Invitation to Murder,* 30 S. Tex.L.Rev. at 278 (axiomatic that society built on respect for law should not grant immunity to killer who through calculation or fortuitous events completely destroys or conceals victim's body). In addition, it is less likely in today's mobile and technological society that a person might vanish and never be heard from again. In a case before the Virginia Supreme Court, a defendant made a similar argument to the one presented by appellant. *Epperly, supra.* Epperly was convicted of first degree murder even though the victim's body was never recovered. Epperly contended that proof of *corpus delicti* is only sufficient if (1) there was an eyewitness to the killing, (2) identifiable remains were found or (3) the accused confesses to the crime. *Epperly,* 294 S.E.2d at 890. The Virginia Supreme Court rejected his argument, expounding upon life in modern society where it

is exceedingly rare that a person can vanish of their own volition:

> ... there is less reason for strictness in the proof of *corpus delicti* now than in earlier times. In Sir Matthew Hale's day,[1] a person might disappear beyond all possibility of communication by going overseas or by embarking in a ship. It would have been most dangerous to infer death merely from his disappearance. Worldwide communication and travel today are so facile that a jury may properly take into account the unlikelihood that an absent person, in view of his health, habits, disposition, and personal relationships would voluntarily flee, "go underground," and remain out of touch with family and friends. The unlikelihood of such a voluntary disappearance is circumstantial evidence entitled to weight equal to that of bloodstains and concealment of evidence.

Id.

Finally, dispensing with the body requirement is consistent with the increasingly accepted view that direct and circumstantial evidence are equally valuable. *Id.* (emphasizing that direct and circumstantial evidence are "entitled to the same weight"). *See, Hankins v. State,* 646 S.W.2d 191, 198–199 (Tex.Cr.App.1981) (Op'n on rehearing). The State may prove its case by direct or circumstantial evidence so long as it shoulders its burden of proving all of the elements of the charged offense beyond a reasonable doubt. *See, Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (enunciating single standard of review for assessing sufficiency of evidence). *See also, State v. Lerch,* 63 Or.App. 707, 666 P.2d 840, 849 (1983) (rejecting argument that higher standard applies when circumstantial evidence relied upon to prove *corpus delicti*), *aff'd,* 296 Or. 377, 677 P.2d 678 (1984); *Geesa v. State,* 820 S.W.2d 154, 156–59 (Tex.Cr.App.1991) (since circumstantial and direct evidence judged by same standard at trial, should therefore be subject to same standard of review on appeal); *and, State v. Rebeterano,* 681 P.2d 1265, 1267 (Utah 1984) (recognizing ***624** that jurisdictions have uniformly held production of body not necessary to prove murder and death can be established by circumstantial evidence). As one state court explained:

> ... circumstantial evidence, like direct evidence, must indicate guilt to the extent that there is no reasonable doubt of that conclusion. In essence, circumstantial and direct evidence is to be analyzed the same in determining its sufficiency to establish a disputed issue.... It would be inconsistent to require more from circumstantial evidence to establish the *corpus delicti* than is required to establish guilt beyond a reasonable doubt.

State v. Smith, 31 Or.App. 321, 570 P.2d 409, 411 (1977). Retention of a body requirement would contradict our holdings that circumstantial evidence and direct evidence are of equal value.

Whatever the reason for the repeal of article 1204, the State is no longer required, in proving murder, to produce a body and identify it as the alleged victim. *Fisher,* 851 S.W.2d at 303. Rather, *corpus delicti* of murder is now shown if the evidence proves (1) the death of a human being; (2) caused by the criminal act of another. *Id.*

II.

Appellant further contends an accomplice witness' testimony must be corroborated in proving the *corpus delicti.* While a conviction may not be had upon accomplice witness testimony unless corroborated, no such requirement applies to *corpus delicti* (except in cases where the defendant's extrajudicial confession is the only evidence offered to prove *corpus delicti.*). *Self, supra.* Since appellant did not make an extrajudicial confession in this case, there is no need to require corroboration in proving the *corpus delicti.* Appellant was charged with murder committed in the course of aggravated kidnaping or attempted aggravated kidnaping.[2] Tex. Penal Code Ann. § 19.03(a)(2). The State was required to prove that appellant intentionally or knowingly caused the death of the alleged victim in the course of intentionally or knowingly abducting her.[3]

Appellant's accomplice, Hank Worley, testified he was with appellant when they abducted the victim on the evening of December 29, 1991. He testified that following the abduction, appellant tortured and repeatedly sexually assaulted the victim. Worley testified they drove into the country and appellant pulled the victim from the car by her hair and continued to sexually assault her. At one point appellant struck the victim. Worley stated the blow caused the victim to "bounce off the ground" a couple of times, and that she could not brace herself for the fall as her hands were tied behind her back. In describing appellant's blow to the victim, Worley testified that "it sounded like a tree limb or something breaking." Even though appellant burned the victim two or three times thereafter, Worley testified the victim did not protest or scream as she had done when burned by appellant

earlier. He stated the victim's body "was limp" and, when picked up by appellant, her feet and legs "were dangling." Appellant put the victim in the trunk. Worley stated the victim did not make any noise while in the trunk. Worley told appellant to let the victim go, but appellant refused. Worley further testified appellant asked him for a pocketknife and a shovel.

Forensic pathologist, Hubbard Fillinger, testified that a single blow to the head can cause death. He further explained:

> ... The kind that you and I are most familiar with is the boxer-type punch to the head where the person sustains a concussion ***625** that is a shaking of the brain causing it to swell very rapidly inside the skull. When it swells, the person loses consciousness extremely rapidly and death can follow in a very short period of time thereafter.

Fillinger also answered a hypothetical question tracking the facts of the instant case:

> [Prosecutor]: Doctor Fillinger, hypothetically speaking, if a single blow was made to the head of an individual, from one individual to another with a person of some size and stature standing over a person of approximately five feet, three inches in height and 115 pounds, one blow from hand to—whether it be open or closed fist—to the had of that individual, on that person's knees, 5'3", 115=pound [sic] person, on that person's knees, the other one standing, the blow sounding like a tree limb breaking, like a break, not a pop sound, the description of the individual that was hit having been knocked back and bouncing off the ground a time or two, being carried after that by the head and being described as limp with her legs and feet dangling, could—could that be compatible with life?
>
> [Fillinger]: Well, the description that you give to me suggests, number one, a blow of a great deal of force that makes a cracking or snapping sound. That tells me that something major has broken, in all probability. Either facial bones, neck bone, jawbone or something.... The loud cracking noise, the fact that the person is limp thereafter would be consistent with brain and/or spinal cord damage. The snapping noise would make it more than likely that we have either facial fractures or damage to the jaw or neck, should again, render a person limp, unconscious and probably not responding as it's described the way she was picked up. Hanging limp, that would indicate to me that there's probably spinal cord damage.

As to the victim's failure to respond, or minimal response, to the burning after being struck, Fillinger stated:

> ... The fact that there is no apparent response or very minimal response after the blow was struck would tell me, number one, that person is not only rendered incapable of perceiving it, but has probably had the nerve tracks in the spine so damaged that they can't even feel it .... if we generate that much pain to a very sensitive part of the anatomy and there's no response, that leads us to believe that the neurological pathways that sent that message up, ouch, are damaged to the point where we don't have any possible recovery. *And that's an indication that life is going to be lost very quickly.*

(Emphasis added.)

Worley testified they abducted the victim from a carwash. Witnesses near the carwash at the time of the abduction heard a woman scream and car doors slam and saw a car matching the description of appellant's car leaving the carwash. The victim's soaped car was found abandoned at the carwash, her keys and purse inside. The victim's apartment was unlocked and there was no evidence she had packed or made arrangements for a trip. The victim never reappeared despite massive efforts on the part of her family and friends to locate her. Her bank accounts and credit cards have remained inactive.

Hair found in the backseat and the trunk of appellant's car had microscopic characteristics similar to hair recovered from the victim's clothing. Worley's sister testified that Worley left with appellant on an evening between Christmas and New Year's, 1991. Another witness testified to driving around Austin with appellant four days before the abduction in this case, looking for a certain prostitute. They stopped to ask a 12 or 13–year–old girl if she knew the woman. According to the witness, as they drove away from the young girl, appellant said, "Why don't we just take her?" Appellant was arrested in Kansas City on May 4, 1992, where he was living under an assumed name.

Reviewing the record evidence in a light most favorable to the verdict, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Worley's testimony as to appellant's forcible abduction of the victim, appellant's beating, sexual assault, and torture of the victim, appellant's statement that he would not release ***626** her and appellant's request for a knife and shovel, together with the victim's sudden and unexplained disappearance established the *corpus delicti* of murder and aggravated kidnaping.[4] The evidence supports the jury's verdict.

With these comments, I join the remainder of the majority opinion.

McCORMICK, P.J., joins this opinion.

MANSFIELD, Judge, concurring.

I join the opinion of the majority but write separately as to the disposition of point of error number fifteen. Appellant avers, in this point of error, the trial court erred in admitting victim impact evidence at the punishment phase. After the trial court overruled appellant's timely objection, the complainant's sister testified as to the effects of the complainant's death on her, her children and her sisters. She testified she was now afraid to go out alone, especially at night, and how much she missed her sister's love and companionship. Finally, she testified it was important to her and her family to have the complainant's remains recovered and buried in the family plot.

In *Smith v. State,* 919 S.W.2d 96 (Tex.Crim.App.1996), a plurality of the Court concluded that testimony by the sister of the victim concerning the victim's good nature, hobbies and work ethic was not relevant to sentencing and, therefore, should not have been admitted. This evidence concerned primarily the character of the victim, not the effect of her death on her family and friends. However, the Court also held that the erroneous admission of such "victim character" evidence in *Smith* was harmless because the evidence:

(1) comprised a relatively miniscule portion of the evidence presented at punishment; and

(2) was not emphasized by the State at closing argument; and

(3) given the overwhelming evidence presented that supported the jury's answers as to the special issues, we concluded the victim impact/character evidence made no contribution to punishment. Tex.R.App.Proc. 81(b)(2).

Smith, supra, 919 S.W.2d at 103.

The evidence in the present case is more akin to that which we found admissible in *Ford v. State,* 919 S.W.2d 107 (Tex.Crim.App.1996). Rather than being evidence of the character of the complainant, the evidence in the present case related to the impact her death has had on her sister and other persons. Such evidence was found by this Court in *Ford* to be arguably relevant to the defendant's moral culpability contained in the mitigation special issue. We concluded the trial court's decision to admit this testimony was not an abuse of discretion in that such testimony was within the zone of reasonable disagreement as to what constituted evidence relevant to sentence. *Id.*

In my opinion, the danger of undue prejudice inherent to a defendant in the introduction of "victim impact" evidence is the same, whether the evidence relates to the victim's character or to the impact his or her death has had on her family and friends.[1] Therefore, I believe the admission of the complainant's sister's testimony in the present case, given *Smith,* was error and should have been subjected to a harm analysis under Tex.R.App.Proc. 81(b)(2). Given the extensive evidence presented at punishment, which overwhelmingly supported the jury's answers as to the special punishment issues, and the fact the State did not emphasize the sister's testimony at closing argument, I conclude beyond a reasonable doubt this evidence made no contribution to punishment and its admission was therefore harmless. *Harris v.* ***627** *State,* 790 S.W.2d 568, 587–588 (Tex.Crim.App.1989); *Smith, supra.*

With these comments, I join the opinion of the Court.

All Citations

939 S.W.2d 607

Footnotes

1 The indictment also charged appellant with aggravated sexual assault and aggravated kidnapping. The jury found him guilty of both offenses and sentenced him to life imprisonment for each.

2 Although the indictment alleged the differing methods of committing capital murder in the conjunctive, i.e. in the course of aggravated sexual assault and aggravated kidnapping, it is proper for the jury to be charged in the disjunctive. *Kitchens v. State,* 823 S.W.2d 256, 258 (Tex.Cr.App.1991), *cert. denied,* 504 U.S. 958, 112 S.Ct. 2309, 119 L.Ed.2d 230 (1992).

* This opinion was prepared by Judge Frank Maloney prior to his leaving the Court.

1 Matthew Hale is often credited with the notion that a body should be produced in order to support a murder conviction. Hale is quoted as writing, "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead." Steele & Kollman, *The Corpus Delicti of Murder,* Voice at 11; Michael E. Wheeler, *Invitation to Murder?: Corpus Delicti, Texas–Style,* 30 S.Tex.L.Rev. 267, 273 (1989); *Epperly v. Commonwealth,* 224 Va. 214, 294 S.E.2d 882, 890 (1982).

2 Appellant was charged in the alternative with murder committed in the course of an aggravated sexual assault. The jury found appellant guilty of capital murder. In a capital murder case where a general verdict is returned, the evidence is sufficient if it supports any of the alternatively submitted theories. *Cook v. State,* 741 S.W.2d 928, 935 (Tex.Cr.App.1987), *judgment vacated and remanded on other grounds,* 488 U.S. 807, 109 S.Ct. 39, 102 L.Ed.2d 19 (1988).

3 "Abduct" was defined in the charge as meaning "to restrain a person with intent to prevent her liberation by secreting or holding her in a place where she is not likely to be found." "Restrain" was defined as "restrict[ing] a person's movements without consent, so as to interfere substantially with her liberty, by moving her from one place to another or by confining her."

4 Worley's testimony was corroborated by other evidence tending to connect appellant to the crime, such as the testimony of Worley's sister, hair recovered from appellant's car and trunk, and the witnesses who saw appellant's car around the carwash at the time of the abduction. *See,* art. 38.14.

1 In my concurrence in *Smith,* I stated my opinion, citing *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), that victim impact evidence is relevant within the context of the mitigation special issue. Therefore, such evidence should always be admissible, subject to an abuse of discretion standard.

102 S.Ct. 3079
Supreme Court of the United States

MICHIGAN

v.

Lamont Charles THOMAS.

No. 81-593.
|
June 28, 1982.

Synopsis

Defendant was convicted in the Oakland County Circuit Court of carrying a concealed weapon, and he appealed. The Michigan Court of Appeals, 106 Mich.App. 601, 308 N.W.2d 170, reversed, and certiorari was granted. The Supreme Court held that: (1) justification to conduct a warrantless search of a car stopped on the road does not vanish once the car has been immobilized, nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant, and (2) where police officers, after stopping car, were justified in conducting an inventory search of the car's glove compartment, which led to the discovery of contraband, such discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle and to conduct a warrantless search thereof, even though both the car and its occupants were already in police custody.

Petition for certiorari and motion of respondent to proceed in forma pauperis granted; judgment of Michigan Court of Appeals reversed; case remanded to that court for further proceedings.

Justice Brennan and Justice Marshall would grant the petition for writ of certiorari and set the case for oral argument.

Opinion

****3080** ***259** PER CURIAM.

While respondent was the front-seat passenger in an automobile, the car was stopped for failing to signal a left turn. As two police officers approached the vehicle, they saw respondent bend forward so that his head was at or below the level of the dashboard. The officers then observed an open bottle of malt liquor standing upright on the floorboard between respondent's feet, and placed respondent under arrest for possession of open intoxicants in a motor vehicle. The 14-year-old driver was issued a citation for not having a driver's license. Respondent claimed ownership of the car.

***260** Respondent and the driver were taken to the patrol car, and a truck was called to tow respondent's automobile. One of the officers searched the vehicle, pursuant to a departmental policy that impounded vehicles be searched prior to being towed. The officer found two bags of marihuana in the unlocked glove compartment. The second officer then searched the car more thoroughly, checking under the front seat, under the dashboard, and inside the locked trunk. Opening the air vents under the dashboard, the officer discovered a loaded, .38-caliber revolver inside.
Respondent was convicted of possession of a concealed weapon. He moved for a new trial, contending that the revolver was taken from his car pursuant to an illegal search and seizure; the trial court denied the motion.

The Michigan Court of Appeals reversed, holding that the warrantless search of respondent's automobile violated the Fourth Amendment. 106 Mich.App. 601, 308 N.W.2d 170 (1981). The court acknowledged that in *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), this Court upheld the validity of warrantless inventory searches of impounded motor vehicles. Moreover, the court found that, since respondent had been placed under arrest and the other occupant of the car was too young to legally drive, it was proper for the officers to impound the vehicle and to conduct an inventory search prior to its being towed. However, in the view of the Court of Appeals, the search conducted in this case was "unreasonable in scope," because it extended to the air vents which, unlike the glove compartment or the trunk, were not a likely place for the storage of valuables or personal possessions. 106 Mich.App., at 606, 308 N.W.2d, at 172.

The Court of Appeals also rejected the State's contention that the scope of the inventory search was properly expanded when the officers discovered contraband in the glove compartment. The court concluded that, because both the car and its occupants were already in police custody, there were ***261** no "exigent circumstances" justifying a warrantless search for contraband.[1]

We reverse. In *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975). See also *United States v. Ross*, 456 U.S. 798, 807, n.9, 102 S.Ct. 2157, 2163, n.9, 72 L.Ed.2d 572 (1982). It is thus clear that the justification to conduct such a warrantless ****3081** search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.[2] See *ibid.*

Here, the Court of Appeals recognized that the officers were justified in conducting an inventory search of the car's ***262** glove compartment, which led to the discovery of contraband. Without attempting to refute the State's contention that this discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle, the Court of Appeals held that the absence of "exigent circumstances" precluded a warrantless search. This holding is plainly inconsistent with our decisions in *Chambers* and *Texas v. White.*

The petition for certiorari and the motion of respondent to proceed *in forma pauperis* are granted, the judgment of the Michigan Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BRENNAN and Justice MARSHALL would grant the petition for a writ of certiorari and set the case for oral argument.

All Citations

458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750

Footnotes

1 The Court of Appeals did not directly address the State's contention that the discovery of marihuana in the glove compartment provided probable cause to believe there was contraband hidden elsewhere in the vehicle. However, the court apparently assumed that the officers possessed information sufficient to support issuance of a warrant to search the automobile; the court's holding was that the officers were required to obtain such a warrant, and could not search on the basis of probable cause alone. See 106 Mich.App., at 606-608, 308 N.W.2d, at 172-173.

2 Even were some demonstrable "exigency" a necessary predicate to such a search, we would find somewhat curious the Court of Appeals' conclusion that no "exigent circumstances" were present in this case. Unlike the searches involved in *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), and *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975)-which were conducted at the station house-the search at issue here was conducted on the roadside, before the car had been towed. As pointed out by Judge Deneweth, in dissent, "there was a clear possibility that the occupants of the vehicle could have had unknown confederates who would return to remove the secreted contraband." 106 Mich.App., at 609, 308 N.W.2d, at 174.

59 Cal.App.5th 943
Court of Appeal, Fourth District, Division 1, California.

The PEOPLE, Plaintiff and Respondent,

v.

Tony Ramon SIMS, Defendant and Appellant.

D077024
|
Filed 1/12/2021

Synopsis

Background: Defendant was convicted on guilty plea in the Superior Court, San Diego County, No. SCD281406, Jay M. Bloom, J., of possession of a firearm by a felon and unlawful possession of ammunition. Defendant appealed.

Holdings: The Court of Appeal, McConnell, J., held that:

warrantless search of vehicle was justified under automobile exception to warrant requirement;

search was incident to custodial arrest, as required for exception to warrant requirement for searches incident to arrest;

reasonable scope of search incident to arrest included backseat area of vehicle;

search incident to arrest was justified by reasonable belief that vehicle contained evidence relevant to establish offense;

amendment to statute limiting time of felony probation was ameliorative change in criminal law that was subject to presumption of retroactivity; and

that presumption of retroactivity was not overcome by clear legislative intent.

Affirmed in part, reversed in part, and remanded.

****795** APPEAL from a judgment of the Superior Court of San Diego County, Jay M. Bloom, Judge. Affirmed in part, reversed in part, and remanded. (Super. Ct. No. SCD281406)

Attorneys and Law Firms

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McCONNELL, P. J.

****796** ***946** I

INTRODUCTION

Defendant Tony Ramon Sims appeals a judgment of conviction entered after he pleaded guilty to two counts of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); counts 1 and 2)[1] and one count of unlawful ***947** possession of ammunition (§ 30305, subd. (a)(1)). He contends the trial court erred in denying a motion to suppress incriminating evidence obtained during a warrantless search of his vehicle. We conclude the court properly denied the motion to suppress because the search of the defendant's vehicle was valid under the automobile exception to the warrant requirement and, in the alternative, as a search incident to arrest.

The defendant also argues he is entitled to seek a reduction of his three-year probation term under recently-enacted Assembly Bill No. 1950 (Stats. 2020, ch. 328, § 2). Effective January 1, 2021, Assembly Bill No. 1950 amended section 1203.1 to limit the maximum probation term a trial court is authorized to impose for most felony offenses to two years. Relying on *In re Estrada* (1965) 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948 (*Estrada*), the defendant asserts Assembly Bill No. 1950's limitation on the maximum duration of felony probation terms constitutes an ameliorative change to the criminal law that applies retroactively to cases that were not reduced to final judgment as of the new law's effective date. We agree.

Therefore, we affirm the judgment in part as to the defendant's conviction, reverse the judgment in part as to the defendant's sentence, and remand the matter for resentencing.

II

BACKGROUND

A

Vehicle Search

The following facts are drawn from the preliminary hearing. (See *People v. Turner* (2017) 13 Cal.App.5th 397, 400, 220 Cal.Rptr.3d 449.)

Shortly before 3:00 a.m., two police officers entered a parking lot in downtown San Diego. The officers were patrolling the area because the bars in downtown San Diego closed at 2:00 a.m., exiting patrons were often involved in criminal offenses, and the parking lot was known as a place where people went to drink and loiter after they left the bars. According to one of the officers, there were "people congregat[ing] ... [and] partying" in the parking lot, many of whom "scattered" when the officers entered it.

The officers approached a parked vehicle in the parking lot. The defendant was seated in the front passenger seat and appeared to be passed out. The keys to ***948** the vehicle were in the ignition when the officers approached the vehicle. The officers engaged the defendant in conversation and detected the odor of alcohol emanating from the defendant. They observed that the defendant had bloodshot eyes, slurred his speech, fumbled for his wallet, and appeared as though he was going to vomit. Based on these observations, the officers immediately believed the defendant was intoxicated and in violation of section 85.10 of the San Diego Municipal Code.[2]

****797** At the officers' request, the defendant provided his name. One officer used his cell phone to search the defendant's name on a criminal records database. The search yielded a record for a person named Tony Sims. The person was on probation and, as a condition of probation, he had executed a Fourth Amendment waiver. The database record included the person's birthdate, height, and weight, as well as a photograph of the person that was approximately one square inch in size when displayed on the officer's cell phone.

The officer asked the defendant whether his birthdate was the birthdate indicated on the database record. The defendant replied, "Yeah." The officer then asked the defendant whether he had been "checking in," apparently to determine whether he was reporting to a probation officer. The defendant replied, "Yeah." Based on these responses and the information contained in the database record, the officer believed the defendant was the Tony Sims whose information was recorded on the database record and, therefore, that the defendant had executed a Fourth Amendment waiver.

The officer asked the defendant to exit the vehicle for a vehicle search. However, the defendant was paralyzed from the waist down. Because the defendant was unable to exit the vehicle without assistance, the officer began to search the vehicle while the defendant remained seated in the front passenger seat. During the ensuing search, the officer recovered a loaded semi-automatic handgun from the rear passenger floorboard. The defendant was then handcuffed and removed from the vehicle, after which the officer continued to search the vehicle. The officer seized a second loaded semi-automatic handgun from underneath the front passenger seat and handgun ammunition from the rear driver side floorboard.

The police later determined the defendant was not the person whose record was produced during the criminal records database search and he had not executed a Fourth Amendment waiver.

***949** B

Procedural Background

The defendant was charged by information with two counts of possession of a firearm by a felon and one count of unlawful possession of ammunition.

The defendant filed a pretrial motion to suppress all evidence obtained during the search of his vehicle, including the firearms and ammunition. He asserted the warrantless search violated his Fourth Amendment right to be free from unreasonable searches and seizures. The trial court considered and denied the suppression motion at the preliminary hearing. It found the evidence obtained during the search was admissible for three independent reasons: (1) the search was permissible under the automobile exception to the warrant requirement because there was probable cause that evidence of the defendant's public intoxication would be found in the vehicle; (2) the search was permissible as a search incident

to arrest; and (3) the evidence was admissible under the good faith exception to the exclusionary rule.[3]

Thereafter, the defendant filed a motion to dismiss the information under section 995, which the trial court denied. The court ****798** determined the search of the vehicle was permissible because the officers had probable cause to arrest the defendant and search the vehicle based on the defendant's state of intoxication. It found, in the alternative, the evidence was admissible under the good faith exception to the exclusionary rule.

Over the objection of the prosecutor, the trial court then offered the defendant an indicated sentence of three years of probation. The defendant pleaded guilty to the face of the information and, per the court's indicated sentence, was placed on probation for three years.

III

DISCUSSION

A

Warrantless Search

The defendant appeals the judgment on grounds that the warrantless search of his vehicle violated his Fourth Amendment rights. Based on the alleged constitutional ***950** violation, the defendant contends the trial court erred in denying his motion to suppress the evidence obtained during the warrantless search of his vehicle.

1

Legal Principles

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures. (U.S. Const., 4th Amend.) "Warrantless searches are presumed to be unreasonable, therefore illegal, under the Fourth Amendment, subject only to a few carefully delineated exceptions." (*People v. Vasquez* (1983) 138 Cal.App.3d 995, 1000, 188 Cal.Rptr. 417.) As discussed more fully below, two exceptions are relevant for purposes of this appeal—the automobile exception and the exception for searches incident to arrest.

In reviewing a trial court's determination on a motion to suppress evidence, "we rely on the trial court's express and implied factual findings, provided they are supported by substantial evidence, to independently determine whether the search was constitutional. [Citation.] 'Thus, while we ultimately exercise our independent judgment to determine the constitutional propriety of a search or seizure, we do so within the context of historical facts determined by the trial court.' [Citation.] It is the trial court's role to evaluate witness credibility, resolve conflicts in the testimony, weigh the evidence, and draw factual inferences. [Citation.] We review those factual findings under the deferential substantial evidence standard, considering the evidence in the light most favorable to the trial court's order." (*People v. Lee* (2019) 40 Cal.App.5th 853, 860–861, 253 Cal.Rptr.3d 512 (*Lee*).)

2

Automobile Exception

The trial court found the search of the defendant's vehicle was constitutionally permissible under the automobile exception to the warrant requirement. We agree.

Under the automobile exception, " 'police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found.' " (*Lee, supra*, 40 Cal.App.5th at p. 862, 253 Cal.Rptr.3d 512; see *U.S. v. Ross* (1982) 456 U.S. 798, 800, 102 S.Ct. 2157, 72 L.Ed.2d 572 [when police have probable cause, they "may conduct a probing search ***951** of compartments and containers within the vehicle whose contents ****799** are not in plain view"].) The historical rationale for the automobile exception was that the "ready mobility" of a vehicle creates a risk that evidence of a crime or contraband will be lost while a warrant is obtained. (*California v. Carney* (1985) 471 U.S. 386, 391, 391–392, 105 S.Ct. 2066, 85 L.Ed.2d 406; see *Carroll v. United States* (1925) 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543.) Over time, courts have also recognized a second rationale for the automobile exception—a person has a "lesser expectation of privacy" in his or her vehicle due to "the pervasive regulation of vehicles capable of traveling on the public highways." (*Carney*, at pp. 391, 392, 105 S.Ct. 2066; see

Cady v. Dombrowski (1973) 413 U.S. 433, 440–441, 93 S.Ct. 2523, 37 L.Ed.2d 706.)

Probable cause "is a more demanding standard than mere reasonable suspicion.' [Citation.] It exists 'where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found....' In determining whether a reasonable officer would have probable cause to search, we consider the totality of the circumstances." (*Lee, supra*, 40 Cal.App.5th at p. 862, 253 Cal.Rptr.3d 512.)

The People argue the officers had probable cause to search the defendant's vehicle because it was reasonable to believe the search would produce evidence the defendant was publicly intoxicated in violation of San Diego Municipal Code section 85.10.[4] We concur. The trial court found the defendant was "drunk in public," a finding that is supported by ample evidence. One officer testified he came to believe the defendant was intoxicated immediately when he encountered the defendant. He based this belief on his personal observations that the defendant had bloodshot eyes, slurred his speech, fumbled with his wallet, seemed as though he was going to vomit, and emitted an odor of alcohol.

Given the defendant's clear state of intoxication, it was reasonable for the officers to believe a search of the vehicle in which the defendant was passed out would produce evidence of alcohol consumption, such as unsealed alcohol containers. (*People v. Molina* (1994) 25 Cal.App.4th 1038, 1042, 30 Cal.Rptr.2d 805 [officer had probable cause to search vehicle for open containers of alcohol after noticing odor of beer during traffic stop]; see *U.S. v. Hulsey* (7th Cir. 2001) 11 Fed.Appx. 607, 611 [search of motorist's vehicle justified based on odor of alcohol and motorist's admission she consumed alcohol]; *U.S. v. Neumann* (8th Cir. 1999) 183 F.3d 753, 755, 756 [officer had ***952** probable cause to search vehicle for open container of alcohol where he detected a "faint odor of alcohol" on motorist's breath and motorist appeared nervous].)

The defendant contends the officers lacked probable cause to search his vehicle because his state of intoxication, standing alone, did not give rise to a reasonable inference that he consumed alcohol *in the vehicle* (as opposed to a bar), or that unsealed containers of alcohol would be found *in the vehicle.* Assuming without deciding that "something more" than the defendant's state of intoxication was necessary for the officers to have probable cause for the search, there was "something more" here. The encounter between the officers and the defendant occurred shortly before 3:00 a.m., after nearby bars had closed. At the hearing on the defendant's suppression ****800** motion, one of the officers testified the parking lot where the defendant was parked was "a known place to hang out after [bars closed], drink, [and] loiter around." The officer added that there were "people congregat[ing] ... around their cars, partying" when the officer and his partner entered the parking lot. These facts, coupled with the defendant's signs of inebriation, provided the officers probable cause to search the vehicle for evidence that the defendant was publicly intoxicated in violation of San Diego Municipal Code section 85.10.

The defendant asserts the officers did not have probable cause to search his vehicle because they already had "enough information" to determine he was publicly intoxicated and "[n]o search of the car was necessary" to determine whether he was in violation of San Diego Municipal Code section 85.10. However, the automobile exception is not so narrow that it applies only when the evidence or contraband believed to be in a vehicle is non-duplicative of other evidence or strictly essential to establish a criminal offense. Rather, where officers have probable cause that a lawfully-stopped vehicle contains evidence of criminal activity or contraband, such probable cause "alone satisfies the automobile exception to the Fourth Amendment's warrant requirement ...." (*Maryland v. Dyson* (1999) 527 U.S. 465, 467, 119 S.Ct. 2013, 144 L.Ed.2d 442.)

For all these reasons, we conclude the police officers had probable cause to search the defendant's vehicle for evidence of his public intoxication. Accordingly, we conclude the search was constitutionally permissible under the automobile exception to the warrant requirement.

***953** 3

Search Incident to Arrest

As an alternative basis for denying the suppression motion, the trial court determined the search of the defendant's vehicle was permissible as a search incident to the defendant's arrest for public intoxication. Once again, we agree with the trial court.

Under the so-called *Gant* rule, police may conduct a warrantless search of the passenger compartment of a vehicle

and any containers therein, as an incident to a lawful arrest of a recent occupant of the vehicle, so long as "the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Arizona v. Gant* (2009) 556 U.S. 332, 351, 129 S.Ct. 1710, 173 L.Ed.2d 485, italics added (*Gant*).) The "exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." (*Id.* at p. 338, 129 S.Ct. 1710; see *People v. Macabeo* (2016) 1 Cal.5th 1206, 1214, 211 Cal.Rptr.3d 34, 384 P.3d 1189 ["A search incident to arrest 'has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained.' "].) The *Gant* rule is a "two-part rule" and a warrantless search will be upheld if either prong is satisfied. (*People v. Johnson* (2018) 21 Cal.App.5th 1026, 1035, 230 Cal.Rptr.3d 869.)

Before we address whether the search satisfied the *Gant* rule, we consider a predicate issue contested by the parties —whether the search was incident to a custodial arrest. We conclude it was. At the hearing on the suppression motion, the arresting officer testified that upon encountering the defendant, he and his partner "were going to place [the defendant] under arrest for [violating section] 85.10 of ****801** the municipal code since there[ ] [was] no one around to take care of him. He[ ] [was] drunk in public. Couldn't take care of himself." The officer added, "[H]e[ ] [was] drunk in or around a vehicle. There[ ] [were] keys in the ignition. He [didn't] have any friends to take care of him. We [couldn't] leave him with somebody else. He[ ] [was] clearly too intoxicated to help himself, and the keys [were] still there.... So he was being placed under arrest in order to be taken to detox or to jail."

The transcript of the officer's bodyworn camera footage corroborates this testimony. Before the search, the officer instructed the defendant to exit the vehicle. At that point, a bystander asked the officer, "Why is he being detained?" The officer replied, "Because he's drunk in[ ] and around a vehicle ... with no one else around him." The officer's contemporaneous ***954** statement that the defendant was being detained due to his state of intoxication, together with the officer's hearing testimony, supports the trial court's implied finding that the officers searched the vehicle incident to a custodial arrest.[5]

The defendant argues the officers did not search his vehicle incident to an arrest; he claims they instead searched it based solely on their mistaken belief that he was on probation and subject to a Fourth Amendment waiver. But the testifying officer refuted this claim during the suppression hearing. According to the officer, he searched the vehicle *both* because he believed (erroneously, as it turns out) that the defendant executed a Fourth Amendment waiver *and* because the defendant was under arrest for public intoxication. After receiving the officer's testimony, the trial court expressly opined the defendant was "drunk in public" and found the search was incident to an arrest. In urging us to reject these findings and disbelieve the testifying officer, the defendant asks us to reweigh the evidence and substitute our findings for those of the trial court. We decline the defendant's invitation, which runs contrary to well-settled principles of appellate review. (*People v. Lieng* (2010) 190 Cal.App.4th 1213, 1218, 119 Cal.Rptr.3d 200 ["In reviewing the ruling on a motion to suppress, the appellate court defers to the trial court's factual findings, express or implied, when supported by substantial evidence."].)

We further conclude the trial court did not err in reaching its implied finding that the vehicle search satisfied the *Gant* rule. At the time the officers began to search the vehicle —and discovered the first loaded firearm—the defendant was unsecured and seated in the front passenger seat of the vehicle. The defendant was plainly "within reaching distance of the passenger compartment" while he was unrestrained and seated inside the passenger compartment. (*Gant, supra*, 556 U.S. at p. 351, 129 S.Ct. 1710.) Therefore, the search—at least the portion of the search conducted while the defendant was seated in the vehicle—was warranted under the first prong of the *Gant* rule.

The defendant asserts it was unreasonable for the arresting officers to believe he might grab something from the vehicle's rear floorboard because he was paralyzed. However, "*Gant* provides the ****802** generalized authority to search the *entire passenger compartment* of a vehicle and any containers therein incident to arrest." (*People v. Nottoli* (2011) 199 Cal.App.4th 531, 555, 130 Cal.Rptr.3d 884 (*Nottoli*), italics added; see *Thornton v. U.S.* (2004) 541 U.S. 615, 623, 124 S.Ct. 2127, 158 L.Ed.2d 905 ["Once an officer ***955** determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment."].) " '[T]he only question the trial court asks is whether the area searched is generally "reachable without

exiting the vehicle, without regard to the likelihood in the particular case that such a reaching was possible." ' " (*U.S. v. Allen* (1st Cir. 2006) 469 F.3d 11, 15, italics omitted; see *United States v. Stegall* (8th Cir. 2017) 850 F.3d 981, 985 ["actual reachability under the circumstances" is irrelevant when considering the scope of a passenger compartment search].) The backseat of a passenger compartment is generally reachable by an unrestrained person seated in the front of the compartment, irrespective of whether the area was reachable by the defendant in this particular instance. Accordingly, the search was proper under the first prong of the *Gant* test.

In any event, the entire search of the vehicle—both before and after the defendant was handcuffed and removed from the vehicle—was a valid search incident to arrest under the second prong of the *Gant* test. For the reasons previously discussed in our analysis of the automobile exception, the officers had a reasonable basis to believe the vehicle contained evidence relevant to establish that the defendant was publicly intoxicated in violation of San Diego Municipal Code section 85.10. (See *People v. Quick* (2016) 5 Cal.App.5th 1006, 1012–1013, 210 Cal.Rptr.3d 256 [" '[W]hen a driver is arrested for driving under the influence, or being under the influence, it will generally be reasonable for an officer to believe evidence related to that crime might be found in the vehicle.' "], quoting *People v. Evans* (2011) 200 Cal.App.4th 735, 750, 133 Cal.Rptr.3d 323; *Nottoli, supra*, 199 Cal.App.4th at p. 553, 130 Cal.Rptr.3d 884 [defendant's "arrest for 'being under the influence of a controlled substance' supplied a reasonable basis for believing that evidence 'relevant' to that type of offense might be in his vehicle."].) For that independent reason, we conclude the search was a valid search incident to arrest.[6]

B

Assembly Bill No. 1950

At the time the defendant was sentenced, section 1203.1, subdivision (a) provided that a court may impose felony probation "for a period of time not exceeding the maximum possible term of the sentence." It further provided that "where the maximum possible term of the sentence is five years or less, ***956** then the period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years." (Former § 1203.1, subd. (a).)

During the pendency of this appeal, the Legislature enacted Assembly Bill No. 1950, which amended section 1203.1. (Stats. 2020, ch. 328, § 2.) Subject to exceptions not applicable here, section 1203.1, subdivision (a), as amended, provides that ****803** a felony probation term cannot exceed two years.[7]

The defendant contends Assembly Bill No. 1950's two-year limitation for felony probation terms applies retroactively to cases like his own that were not final when the new law became effective on January 1, 2021. In support of this argument, the defendant relies on the presumption of retroactivity articulated in *Estrada, supra*, 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948. As we will explain, we agree with the defendant that Assembly Bill No. 1950's two-year felony probation limitation applies retroactively.

1

The Estrada Presumption

By default, criminal statutes are presumed to apply prospectively only. (§ 3 ["No part of [the Penal Code] is retroactive, unless expressly so declared."]; see *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307, 228 Cal.Rptr.3d 394, 410 P.3d 22 (*Lara*).) "However, this presumption is a canon of statutory interpretation rather than a constitutional mandate. [Citation.] Accordingly, 'the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication.' (*People v. Frahs* (2020) 9 Cal.5th 618, 627, 264 Cal.Rptr.3d 292, 466 P.3d 844 (*Frahs*).) To determine whether a law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature. (*Ibid.*)

In *Estrada, supra*, 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948, the Supreme Court set forth an important qualification to the default presumption against retroactivity. The *Estrada* Court recognized that when the Legislature enacts a new law ameliorating a criminal penalty, it determines "that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*Id.* at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948.) The *Estrada* Court determined that in the absence of an express savings clause or

other indication of prospective-only application, courts must infer the Legislature ***957** intended its new ameliorative law to apply "to every case to which it constitutionally could apply," including cases in which the criminal acts were committed before the law's passage provided the defendant's judgment is not final. (*Ibid.*) To hold otherwise, the *Estrada* Court reasoned, "would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Ibid.*)

The ameliorative law at issue in *Estrada* was a law that reduced the penalties applicable to a particular criminal offense. (*Estrada, supra*, 63 Cal.2d at pp. 743–744, 48 Cal.Rptr. 172, 408 P.2d 948.) However, the *Estrada* presumption of retroactivity has been applied in numerous other contexts since it was first articulated. For instance, the Supreme Court has applied the *Estrada* presumption to statutes governing penalty enhancements and substantive offenses. (*Frahs, supra*, 9 Cal.5th at p. 628, 264 Cal.Rptr.3d 292, 466 P.3d 844 [collecting cases].) Further, and pertinent to this appeal, it has applied the *Estrada* presumption "to statutes that merely made a reduced punishment *possible*." (*Id.* at p. 629, 264 Cal.Rptr.3d 292, 466 P.3d 844 [collecting cases].)

People v. Francis (1969) 71 Cal.2d 66, 75 Cal.Rptr. 199, 450 P.2d 591 was an early ****804** case in which the Supreme Court applied the *Estrada* presumption to a law that merely made reduced punishment possible. In that case, the Legislature modified the punishment for possession of marijuana, which had been a straight felony, to permit it to be treated as a misdemeanor. (*Id.* at p. 70, 75 Cal.Rptr. 199, 450 P.2d 591.) The People argued the amendment did not reflect a "legislative determination that the 'former penalty was too severe,' " and thus did not apply retroactively, because it afforded courts "discretion to impose either the same penalty as under the former law or a lesser penalty." (*Id.* at p. 76, 75 Cal.Rptr. 199, 450 P.2d 591.) The Supreme Court rejected this argument and applied the *Estrada* presumption. (*Ibid.*) Although the new law did not guarantee a lighter sentence for defendants, the presumption of retroactivity applied because the new law reflected a legislative determination that "the former penalty provisions may have been too severe *in some cases* ...." (*Id.* at p. 76, 75 Cal.Rptr. 199, 450 P.2d 591, italics added.)

The Supreme Court employed similar reasoning in *Lara, supra*, 4 Cal.5th 299, 228 Cal.Rptr.3d 394, 410 P.3d 22. In that case, the Supreme Court was asked to decide whether to give retroactive application to a provision of Proposition 57 that eliminated prosecutors' unilateral authority to charge a juvenile offender directly in adult court and instead required prosecutors to obtain a juvenile court's approval before trying a juvenile offender in adult court. (*Id.* at pp. 305–306, 228 Cal.Rptr.3d 394, 410 P.3d 22.) Proposition 57 was "different from the statutory changes in *Estrada*" because it "did not ameliorate the punishment, or possible punishment, for a particular crime; rather, it ameliorated the possible punishment for a class of persons, namely juveniles." (*Id.* at p. 308, 228 Cal.Rptr.3d 394, 410 P.3d 22.) Nonetheless, the Court held that the *Estrada* presumption applied. According to the Supreme Court, the fact that Proposition 57 had a potential ameliorating benefit in some cases for some juvenile offenders warranted retroactive application. (*Id.* at p. 309, 228 Cal.Rptr.3d 394, 410 P.3d 22.)

***958** Just last year, the Supreme Court applied the *Estrada* presumption of retroactivity to another law that merely made reduced punishment possible, in *Frahs, supra*, 9 Cal.5th 618, 264 Cal.Rptr.3d 292, 466 P.3d 844. The law at issue in *Frahs* was a statute establishing a pretrial diversion program for certain defendants with mental health disorders. (*Id.* at pp. 626–627, 264 Cal.Rptr.3d 292, 466 P.3d 844.) Under the pretrial diversion statute, defendants who were granted diversion were referred to a mental health treatment program and entitled to a possible dismissal of their criminal charges. (*Id.* at pp. 626–627, 264 Cal.Rptr.3d 292, 466 P.3d 844.) Because a court's decision to grant diversion could result in a defendant receiving mental health treatment, avoiding criminal prosecution, and maintaining a clean criminal record, as opposed to suffering a prison sentence, the pretrial diversion statute "offer[ed] a potentially ameliorative benefit for a class of individuals—namely, criminal defendants who suffer[ed] from a qualifying mental disorder." (*Id.* at p. 631, 264 Cal.Rptr.3d 292, 466 P.3d 844.) Based on the pretrial diversion statute's ameliorative nature, the Supreme Court determined the statute fell "squarely within the spirit of the *Estrada* rule," and was therefore entitled to retroactive application. (*Ibid.*)

With these principles in mind, we turn to whether Assembly Bill No. 1950's two-year limitation on felony probation operates retroactively.

2

Application

The People assert Assembly Bill No. 1950's felony probation limitation is ****805** not subject to the *Estrada* presumption of retroactivity. They contend the *Estrada* presumption applies only to criminal laws that reduce punishment and, according to the People, probation is not punishment.

The People are correct that "[a] grant of probation is 'qualitatively different from such traditional forms of punishment as fines or imprisonment.' " (*People v. Moran* (2016) 1 Cal.5th 398, 402, 205 Cal.Rptr.3d 491, 376 P.3d 617.) Probation is primarily rehabilitative and a grant of probation is considered an act of grace or clemency in lieu of traditional forms of punishment. (*Ibid.*; but see *People v. Edwards* (1976) 18 Cal.3d 796, 801, 135 Cal.Rptr. 411, 557 P.2d 995 [probation is "an alternative form of punishment in those cases when it can be used as a correctional tool"]; *Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 837, 196 Cal.Rptr.3d 848 ["Both California and federal courts ... regard probation as a 'form of punishment' "]; *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1170, 45 Cal.Rptr.3d 501 [retroactive application of statute mandating imposition of certain probation conditions violated ex post facto principles because it "impose[d] greater punishment in probation cases"].)

***959** However, we do not believe the label affixed to probation—i.e., whether it is labeled punishment, rehabilitation, or some combination—is necessarily determinative of whether the *Estrada* presumption of retroactivity applies. When a court places a defendant on probation, it may, of course, fine the defendant or order the defendant confined in jail, or both. (§ 1203.1, subd. (a).) But it has discretion to impose a variety of other probation conditions as well. It may, for example, require that the probationer submit to searches of electronic devices and social media accounts (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 176 Cal.Rptr.3d 413), submit to periodic drug testing (Health & Saf. Code, § 11551), refrain from associating with persons or groups of persons (*People v. Mendez* (2013) 221 Cal.App.4th 1167, 165 Cal.Rptr.3d 157), and obtain permission from a probation officer before changing addresses or leaving the state or county (*People v. Matranga* (1969) 275 Cal.App.2d 328, 80 Cal.Rptr. 313; see *People v. Relkin* (2016) 6 Cal.App.5th 1188, 211 Cal.Rptr.3d 879). A probationer may even be required to wear a continuous electronic monitoring device that alerts a probation officer to the probationer's whereabouts at all times (§ 1210.7 et seq.).

As these illustrative examples make clear, probation—though often deemed preferable to imprisonment from the perspective of a defendant—can be invasive, time-consuming, and restrictive for a probationer.[8] A probationer "is in constructive custody—he is under restraint." (*People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 221, 237 Cal.Rptr.3d 873; see *People v. Cisneros* (1986) 179 Cal.App.3d 117, 120, 224 Cal.Rptr. 452 [a probationer is in "constructive incarceration"].) Thus, "[w]hile probation is not technically a 'punishment,' being ' "rehabilitative in nature" ' [Citation], there is no question it is a sanction that imposes significant restrictions on the civil liberties of a defendant." (*People v. Davis* (2016) 246 Cal.App.4th 127, 140, fn. 6, 200 Cal.Rptr.3d 642; see *Hicks on Behalf of Feiock v. Feiock* (1988) 485 U.S. 624, 639, fn. 11, 108 S.Ct. 1423, 99 L.Ed.2d 721 ["A determinate term of probation puts the contemnor under numerous disabilities that he cannot ****806** escape"].) By limiting the maximum duration a probationer can be subject to such restraint, Assembly Bill No. 1950 has a direct and significant ameliorative benefit for at least some probationers who otherwise would be subject to additional months or years of potentially onerous and intrusive probation conditions.

Further, a trial court possesses broad discretion to revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe ... the person has violated any of the conditions of their supervision ...." (§ 1203.2, subd. (a).) A probation violation need not be proven ***960** beyond a reasonable doubt or by clear or convincing evidence; a mere preponderance of the evidence is sufficient to support a finding that a probation condition has been violated. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441, 272 Cal.Rptr. 613, 795 P.2d 783.) Upon a finding that a probation condition has been violated, courts can—and routinely do—sentence noncompliant probationers to prison to serve out their sentences. (§ 1203.2, subd. (c); see Feinstein, *Reforming Adult Felony Probation to Ease Prison Overcrowding: An Overview of California S.B. 678* (2011) 14 Chapman L.Rev. 375, 380–381 ["A probationer 'fails' probation when he has his probation status revoked due to a technical violation, like failing a drug test, or he is convicted for a new crime. Of those who fail each year, a significant portion–somewhere from 14,532 to an upward estimate of 20,000–winds up in state prison."], footnotes omitted.)

There is no dispute that the longer a probationer remains on probation, the more likely it is he or she will be found to be in violation of a probation condition. There also is no dispute

that the longer a probationer remains on probation, the more likely it is he or she will be sentenced to prison for a probation violation. Assembly Bill No. 1950 does not guarantee that a probationer will abide by his or her probation conditions and, as a result, avoid imprisonment. However, by limiting the duration of felony probation terms, Assembly Bill No. 1950 ensures that at least some probationers who otherwise would have been imprisoned for probation violations will remain violation-free and avoid incarceration. Like the laws at issue in *Lara* and *Frahs*, Assembly Bill No. 1950 thus ameliorates possible punishment for a class of persons—felony probationers. In the absence of a contrary indication, we must apply the *Estrada* presumption and presume the Legislature intended its " 'ameliorative change[ ] to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' " (*People v. Buycks* (2018) 5 Cal.5th 857, 881, 236 Cal.Rptr.3d 84, 422 P.3d 531, quoting *People v. Conley* (2016) 63 Cal.4th 646, 657, 203 Cal.Rptr.3d 622, 373 P.3d 435 (*Conley*).)

Our conclusion is consistent with *People v. Burton* (2020) 58 Cal.App.5th Supp. 1, 272 Cal.Rptr.3d 797, a recent decision from the Appellate Division of the Los Angeles Superior Court giving retroactive application to Assembly Bill No. 1950's one-year limitation on misdemeanor probation terms. The *Burton* court found that "[t]he longer the length of probation, the greater the encroachment on a probationer's interest in living free from government intrusion." (*Id.* at p. 15, 272 Cal.Rptr.3d 797.) It also found that "[t]he longer a person is on probation, the potential for the person to be incarcerated due to a violation increases accordingly." (*Ibid.*) For both reasons, the court determined the one-year limitation for misdemeanor probation was an ameliorative change for purposes of *Estrada*. (*Id.* at p. 16, 272 Cal.Rptr.3d 797.) Although the ****807** *Burton* decision concerned the retroactivity of the law's one-year limitation on misdemeanor ***961** probation terms, its logic applies equally to the law's two-year limitation on felony probation terms. The *Burton* decision, while not binding on us, bolsters our conclusion that the *Estrada* presumption of retroactivity applies to the felony probation limitation contained in Assembly Bill No. 1950.

Our conclusion finds further support in *People v. Quinn* (Jan. 11, 2021, A156932) —— Cal.App.5th ——, 273 Cal.Rptr.3d 770, 2021 Cal.App.Lexis 27 (*Quinn*), an opinion issued the same day oral argument took place in this case. In *Quinn*, our colleagues in Division Four of the First District Court of Appeal concluded, as we do here, that the *Estrada* presumption of retroactivity applies to the two-year felony probation limitation in Assembly Bill No. 1950. (*Id.* at pp. —— – ——, 273 Cal.Rptr.3d 770, 2021 Cal.App.Lexis 27, at pp. *3–12.) The *Quinn* decision cited extensively from the *Burton* decision and noted that its reasoning was "persuasive." (*Id.* at pp. —— – ——, 273 Cal.Rptr.3d 770, 2021 Cal.App.Lexis 27, at pp. *9–11.) We agree.[9]

Although we have determined that Assembly Bill No. 1950's limitation on felony probation terms is an ameliorative change under *Estrada*, that fact alone does not dictate whether the law applies retroactively. "Because the *Estrada* rule reflects a presumption about legislative intent, rather than a constitutional command, the Legislature ... may choose to modify, limit, or entirely forbid the retroactive application of ameliorative criminal-law amendments if it so chooses." (*Conley, supra*, 63 Cal.4th at p. 656, 203 Cal.Rptr.3d 622, 373 P.3d 435.) If the Legislature wishes to do so, it must "clearly signal[ ] its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent." (*People v. Nasalga* (1996) 12 Cal.4th 784, 793, 50 Cal.Rptr.2d 88, 910 P.2d 1380.)

Assembly Bill No. 1950 does not contain a savings clause evincing a clear intent to overcome the *Estrada* presumption of retroactivity. "Nor do we perceive in the legislative history a clear indication that the Legislature did not intend for the statute to apply retroactively." (*Frahs, supra*, 9 Cal.5th at p. 635, 264 Cal.Rptr.3d 292, 466 P.3d 844.) On the contrary, the legislative history for Assembly Bill No. 1950 suggests the Legislature harbored strong concerns that probationers—including probationers whose cases are pending on appeal—face unwarranted risks of incarceration due to the lengths of their probation terms.

For instance, the Assembly and Senate Committees on Public Safety quoted the following statement from Assembly Bill No. 1950's author in their bill reports: " '[A] large portion of people violate probation and end up incarcerated as a result.... 20 percent of prison admissions in California are ***962** the result of supervised probation violations, accounting for the estimated $2 billion spent annually by the state to incarcerate people for supervision violations. Eight percent of people incarcerated in a California prison are behind bars for supervised probation violations. Most violations are "technical" and minor ****808** in nature, such as missing a drug rehab appointment or socializing with a friend who has a criminal record. [¶] "Probation - originally meant to reduce recidivism–has instead become a pipeline for reentry

into the carceral system.... A shorter term of probation, allowing for an increased emphasis on services, should lead to improved outcomes for both people on misdemeanor and felony probation while reducing the number of people on probation returning to incarceration." (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1950 (2019–2020 Reg. Sess.) as amended May 6, 2020 (hereafter, Assembly Public Safety Report), p. 3; Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1950 (2019–2020 Reg. Sess.), as amended June 10, 2020, p. 4 (hereafter, Senate Public Safety Report); see also Assem. Com. on Appropriations, Rep. on Assem. Bill No. 1950 (2019–2020 Reg. Sess.) as amended May 21, 2020, p. 1 [defendants "on probation for extended periods of time are less likely to be successful because even minor or technical violations of the law may result in a violation of probation"].)

The Assembly Public Safety Report went on to cite a publication suggesting " 'probation can actually increase the probability of future incarceration—a phenomenon labeled "back-end net-widening[.]" ' " (Assem. Public Safety Rep., *supra*, at p. 5.) It added that some scholars believe " 'enhanced restrictions and monitoring of probation set probationers up to fail, with mandatory meetings, home visits, regular drug testing, and program compliance incompatible with the instability of probationers' everyday lives. In addition, the enhanced monitoring by probation officers (and in some cases, law enforcement as well) makes the detection of minor violations and offenses more likely.' " (*Ibid.*) According to the Assembly Public Safety Report, "[i]f the fact that an individual is on probation can increase the likelihood that they will be taken back into custody for a probation violation that does not necessarily involve new criminal conduct, then shortening the period of supervision is a potential avenue to decrease individuals' involvement in the criminal justice system for minor infractions." (*Ibid.*)

While these legislative materials do not speak directly to the issue of retroactivity, they suggest the Legislature viewed Assembly Bill No. 1950 as an ameliorative change to the criminal law that would ensure that many probationers avoid imprisonment. Presumably, the Legislature was aware such ameliorative changes apply retroactively under the *Estrada* presumption. (See *People v. Carrasco* (1981) 118 Cal.App.3d 936, 945, 173 Cal.Rptr. 688 ["A cardinal principle of statutory construction is that the Legislature is presumed to be aware of existing judicial practices and interpretations when ***963** it enacts a statute."].) There is no indication in the law's text or legislative materials that the Legislature intended to alter the default *Estrada* presumption. This omission suggests the Legislature had no such intent.

The People do not identify any statutory language or legislative history supporting their claim that Assembly Bill No. 1950 applies prospectively only. Instead, they argue that a retroactive application of the law would unjustly deprive some existing probationers of helpful rehabilitative services they would otherwise receive if they were permitted to complete their existing probation terms. This policy argument sheds no light on whether the Legislature evinced a clear intent to overcome the *Estrada* presumption of retroactivity. In any event, Assembly Bill No. 1950's legislative history undercuts the People's policy argument concerning the extent to which probationers would benefit from more than two years of probation services. For instance, the Assembly Public Safety Report ****809** states "that probation services, such as mental healthcare and addiction treatment, are most effective during the first 18 months of supervision," and concluded "[a] two year period of supervision would likely provide a length of time that would be sufficient for a probationer to complete any counseling or treatment that is directed by a sentencing court." (Assem. Public Safety Rep., *supra*, at p. 6; see Sen. Public Safety Rep., *supra*, at p. 6 ["The purpose of the bill is to end wasteful spending[ ] [and] to focus limited rehabilitative and supervisory resources on persons in their first 12 to 24 months on probation...."]; *Quinn, supra*, at pp. ——– – ——, 273 Cal.Rptr.3d 770, 2021 Cal.App.Lexis 27, at pp. *15–16 ["the amendment of Assembly Bill No. 1950 reflects a categorical determination that a shorter term of probation is sufficient for the purpose of rehabilitation"].)

The People assert retroactive application of Assembly Bill No. 1950 may harm some current probationers in another way—by preventing them from successfully completing their existing probation conditions in a timely manner. This is another policy argument that has little, if any, relevance to whether the two-year limitation applies retroactively. Regardless, the logistical problems associated with a two-year probation limitation "do not provide a sufficient basis to deny defendants the benefit of [the two-year limitation] altogether." (*Frahs, supra*, 9 Cal.5th at p. 636, 264 Cal.Rptr.3d 292, 466 P.3d 844; accord *Quinn, supra*, at p. ——, 273 Cal.Rptr.3d 770, 2021 Cal.App.Lexis 27, at p. *16 ["There is no indication in the legislative history [of Assembly Bill No. 1950] that the Legislature was concerned with disruptions to probationary proceedings already in progress."].) We are confident that to the extent current probationers face difficulties timely completing their

probation conditions through no fault of their own, those conditions can be modified as needed to account for the two-year felony probation limitation our Legislature has imposed. (§ 1203.3, subd. (a); see *People v. Killion* (2018) 24 Cal.App.5th 337, 340, 233 Cal.Rptr.3d 911 ["Generally, a trial court has the authority and discretion to modify a probation term during the probationary period, including the power to terminate probation early."].)

***964** For all these reasons, we conclude the two-year limitation on felony probation set forth in Assembly Bill No. 1950 is an ameliorative change to the criminal law that is subject to the *Estrada* presumption of retroactivity. The Legislature did not include a savings clause or other clear indication that the two-year limitation applies on a prospective-only basis. Therefore, we conclude the two-year limitation applies retroactively to all cases not reduced to final judgment as of the new law's effective date. Here, the defendant's case was pending on direct appeal and thus was not final as of Assembly Bill No. 1950's effective date. Accordingly, the defendant is entitled to seek a reduced probation term on remand under Assembly Bill No. 1950.

IV

DISPOSITION

The judgment is affirmed in part as to the defendant's conviction and reversed in part as to the defendant's sentence. The matter is remanded for resentencing consistent with this opinion.

WE CONCUR:

BENKE, J.

AARON, J.

All Citations

59 Cal.App.5th 943, 273 Cal.Rptr.3d 792, 21 Cal. Daily Op. Serv. 757, 2021 Daily Journal D.A.R. 483

Footnotes

1 All further statutory references are to the Penal Code unless otherwise noted.

2 San Diego Municipal Code section 85.10 states: "No person who is under the influence of intoxicating liquor or narcotic drugs shall be in or about any motor vehicle, while such vehicle is in or upon any street or other public place."

3 The court did not expressly reference the automobile exception. However, it opined the defendant was "drunk in public" under section 647, subdivision (f), "or whatever statute [the People] want[ed] to use. So ... the[ ] [police] ha[d] ... probable cause to search the vehicle for evidence of that." It is clear to us, and the defendant agrees, that the court relied on the automobile exception as the basis for this ruling.

4 The People do not address whether there was probable cause to search for evidence of a violation of section 647, subdivision (f), the public intoxication statute. Rather, they argue exclusively that there was probable cause to search for evidence of a violation of the San Diego Municipal Code section 85.10.

5 The fact that the search of the vehicle occurred before the defendant's formal arrest is of no moment, given that the formal "arrest follow[ed] 'quickly on the heels' of the search" and was "supported by probable cause independent of the fruits of the search ...." (*U.S. v. Smith* (9th Cir. 2004) 389 F.3d 944, 951; see *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed.2d 633 ["Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."].)

6 Because the search of the vehicle was constitutionally permissible under the automobile exception and as a search incident to arrest, we do not consider whether the trial court properly denied the suppression motion under the good faith exception to the exclusionary rule.

7 Assembly Bill No. 1950 also amended section 1203a to limit the maximum length of a misdemeanor probation term for most misdemeanor offenses to one year. (Stats. 2020, ch. 328, § 1.)

8 If a defendant does not believe probation is preferable, "he or she may refuse probation and choose to serve the sentence." (*People v. Olguin* (2008) 45 Cal.4th 375, 379, 87 Cal.Rptr.3d 199, 198 P.3d 1.)

9 The *Quinn* court added that even if the *Estrada* presumption of retroactivity does not apply to the two-year felony probation limitation in Assembly Bill No. 1950, it is very clear from extrinsic sources that the Legislature intended the two-year felony probation limitation to apply retroactively. (*Quinn, supra*, at pp. ——– – ———, 273 Cal.Rptr.3d 770, 2021 Cal.App.Lexis 27, at pp. *11–13.) Given our determination that the *Estrada* presumption of retroactivity applies, we do not reach this issue.

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989 F.3d 548
United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Joshua REEDY, Defendant-Appellant.

No. 20-2444
|
Argued February 18, 2021
|
Decided March 1, 2021

Synopsis

Background: Defendant, who was charged with unlawful possession of firearm by felon, moved to suppress. The United States District Court for the Western District of Wisconsin, William M. Conley, J., denied motion. Following conditional guilty plea, defendant appealed.

Holdings: The Court of Appeals, Scudder, Circuit Judge, held that:

police officers had reasonable suspicion to conduct *Terry* stop;

duration of *Terry* stop was reasonable;

officers had probable cause to arrest defendant; and

warrantless search of vehicle was justified as search incident to arrest.

Affirmed.

***550** Appeal from the United States District Court for the Western District of Wisconsin. No. 3:19-cr-159 — **William M. Conley**, *Judge*.

Attorneys and Law Firms

Taylor L. Kraus, Attorney, Office of the United States Attorney, Madison, WI, for Plaintiff-Appellee.

Daniel J. Hillis, Attorney, Office of the Federal Public Defender, Springfield, IL, Thomas W. Patton, Attorney, Office of the Federal Public Defender, Peoria, IL, for Defendant-Appellant.

Before Brennan, Scudder, and Kirsch, Circuit Judges.

Opinion

Scudder, Circuit Judge.

In August 2019, police responded to a call that a homeless person was sleeping in a car behind a Goodwill store in Eau Claire, Wisconsin. Officers responded and found Joshua Reedy wearing a bulletproof vest and sitting in the front passenger seat of a cluttered Kia SUV. The officers saw an open knife, crowbar, and walkie-talkie on the car's floorboard. Reedy said that his friend Jason was visiting someone in a nearby neighborhood. Telling Reedy to stay put with one officer, another officer went looking for Jason, only to find him in a backyard wearing dress clothes yet claiming to be doing lawn work. When the police searched Jason's backpack, they found methamphetamine, credit cards in others' names, latex gloves, rocks, knives, bolt cutters, shotgun ammo, and a walkie-talkie tuned to the same channel as Reedy's. All of this led to Jason's and Reedy's arrests and a search of the Kia, which turned up a shotgun. Reedy then faced a federal gun possession charge.

The district court denied Reedy's motion to suppress the gun found in the Kia. Reedy then pleaded guilty while reserving his right to appeal the district court's suppression ruling. On appeal Reedy contends that he was under arrest from the moment the police told him he was not free to leave while they looked for Jason. On this view, the police could not rely on any after-the-fact evidence obtained during their encounter with Jason to supply the probable cause necessary to authorize the search of Reedy's car and his firearm-related arrest. The district court saw the evidence differently and so do we, leaving us to affirm.

I

A

Everything began with the Eau Claire police responding on a Friday morning to ***551** a call from a Goodwill employee reporting that a homeless person appeared to be living in a

white SUV parked behind the store. Officer Todd Johnson arrived first around 8:30 a.m. and saw a beat-up, white Kia SUV matching the caller's description.

Upon approaching the car, Officer Johnson saw Joshua Reedy in the front passenger seat. He recognized Reedy from previous encounters. Indeed, Reedy was a known felon with approximately 27 prior arrests. Officer Johnson observed Reedy wearing a bulletproof vest and noticed a walkie-talkie near Reedy's feet. The walkie-talkie was on and tuned to channel 13.

Within minutes, a second officer arrived. Reedy told the police that he had driven to the Goodwill parking lot with his friend Jason, and that Jason had walked off to visit a friend living in a nearby residential area. The second officer, Officer Farley, left to go look for Jason.

At 8:33 a.m., Sergeant Brandon Dohms arrived at the Goodwill, where he briefly joined Officer Farley in the search for Jason before returning to the parking lot. As Sergeant Dohms approached the Kia, he too saw the walkie-talkie on the floorboard along with a crowbar and an open huntingstyle knife. Sergeant Dohms ordered Reedy out of the car and patted him down, finding no weapons.

Sergeant Dohms suspected that Reedy was engaged in criminal activity. Before leaving the parking area to look again for Jason, Sergeant Dohms told Officer Farley that Reedy was not free to go anywhere. Officer Farley and other officers soon determined that the Kia would have to be towed because it was not registered, had invalid plates, and was leaking gas.

Meanwhile, within approximately 20 to 40 minutes of looking for Reedy's friend, Sergeant Dohms spotted a man in a nearby residential backyard who identified himself as Jason Harding. The backyard was less than a block from the Goodwill and separated by a hill and fence. When asked what he was doing, Harding claimed to be completing landscaping work. That explanation made little sense to Sergeant Dohms and Officer Johnson, however, as Harding was wearing dress pants and dress shoes.

Sergeant Dohms told Harding that the police were investigating Reedy, who was parked behind the nearby Goodwill. Although denying that he knew Reedy, Harding consented to a pat down, which resulted in the police finding a walkie-talkie—also tuned to channel 13.

Sergeant Dohms then spoke to the homeowner, who stated that he knew Harding and Reedy though had not hired Harding to do any yard work. The homeowner also confirmed being with Harding and Reedy the night before, but said that the two were gone when he woke up that morning.

Sergeant Dohms then found a backpack laying in the yard, which the homeowner said belonged to Harding. Harding agreed and allowed Sergeant Dohms to search it, leading to the discovery of several credit cards in other people's names, shotgun shells, knives, rocks, latex gloves, and bolt cutters. Sergeant Dohms also found an eyeglass case containing a syringe with a white, opaque liquid that looked like methamphetamine. Sergeant Dohms arrested Harding for drug possession and walked him back to the Goodwill. A field test confirmed that the substance contained methamphetamine.

Back in the parking lot, Sergeant Dohms searched the Kia and found a shotgun. Because Sergeant Dohms already knew that Reedy was a convicted felon, he arrested Reedy for unlawful gun possession. The arrest occurred at 10:08 a.m., just over 90 minutes after the police first ***552** responded to the Goodwill. Reedy confessed in a post-arrest statement that the shotgun was his.

A federal grand jury indicted Reedy for one count of unlawful possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). Reedy then moved to suppress both the gun found in the car and his confession, contending that the police detained him longer than necessary to carry out their investigation, such that any evidence obtained as a result of the prolonged detention must be suppressed.

B

The district court denied Reedy's motion. The beginning point for the district court was a finding that the police had ample reason upon encountering Reedy to believe criminal activity was afoot. This reasonable suspicion, in turn, allowed the police to keep Reedy from leaving while officers went looking for Harding. Everything the police saw and heard, the district court emphasized—the bulletproof vest, walkie-talkie, open knife, and crowbar, along with Reedy's story about Harding—supported this determination. Something fishy sure seemed to be going on.

Nor did the duration of the detention trouble the district court. The stop was not longer than reasonably necessary for the police to look for Harding and return to the Goodwill. And what the police learned during their encounter with Harding, the district court reasoned, supplied the probable cause necessary to arrest Reedy for possessing burglarious tools (a violation of Wisconsin law) and, in turn, to search the car and find the shotgun.

After the district court denied the suppression motion, Reedy conditionally pleaded guilty to the firearm charge, reserving his right to challenge the denial of the suppression motion. The district court sentenced Reedy to 42 months' imprisonment. He now appeals.

II

The Fourth Amendment protects people from unreasonable searches and seizures. Stopping someone is generally considered a seizure and ordinarily requires probable cause to be reasonable. See *Dunaway v. New York*, 442 U.S. 200, 213, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In *Terry v. Ohio*, the Supreme Court recognized an exception to the probable-cause requirement. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "Under *Terry*, police officers may briefly detain a person for investigatory purposes based on the less exacting standard of reasonable suspicion that criminal activity is afoot." *United States v. Eymann*, 962 F.3d 273, 282 (7th Cir. 2020) (citing *Terry*, 392 U.S. at 21–22, 88 S.Ct. 1868). Reasonable suspicion must account for the totality of the circumstances and "requires 'more than a hunch but less than probable cause and considerably less than preponderance of the evidence.' " *Gentry v. Sevier*, 597 F.3d 838, 845 (7th Cir. 2010) (quoting *Jewett v. Anders*, 521 F.3d 818, 823–25 (7th Cir. 2008)).

A *Terry* stop comes with limits. For a stop to "pass constitutional muster, the investigation following it must be reasonably related in scope and duration to the circumstances that justified the stop in the first instance so that it is a minimal intrusion on the individual's Fourth Amendment interests." *United States v. Robinson*, 30 F.3d 774, 784 (7th Cir. 1994). This means a *Terry* stop cannot continue indefinitely. See *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). A stop lasting too long becomes "a de facto arrest that must be based on probable cause." *United States v. Bullock*, 632 F.3d 1004, 1015 (7th Cir. 2011).

***553** Right to it, one of three things must happen during a *Terry* stop: "(1) the police gather enough information to develop probable cause and allow for continued detention; (2) the suspicions of the police are dispelled and they release the suspect; or (3) the suspicions of the police are *not* dispelled, yet the officers have not developed probable cause but must release the suspect because the length of the stop is about to become unreasonable." *United States v. Leo*, 792 F.3d 742, 751 (7th Cir. 2015) (citations omitted).

Whether a *Terry* stop becomes unreasonably prolonged turns on the direction the Supreme Court provided in *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) and *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). In *Place*, the Court declined to adopt any bright-line time limit. See 462 U.S. at 709, 103 S.Ct. 2637. "Such a limit," the Court explained, "would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation." *Id.* at 709 n.10, 103 S.Ct. 2637. Two years after *Place* rejected a "hard-and-fast time limit," the Court decided *Sharpe* and explained that when analyzing whether a *Terry* stop has exceeded a reasonable duration, courts should "examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Sharpe*, 470 U.S. at 686, 105 S.Ct. 1568 (citing *Place*, 462 U.S. at 709, 103 S.Ct. 2637).

Perhaps above all else, *Place* and *Sharpe* emphasize the fact-intensive inquiry necessary to determine whether a *Terry* stop has exceeded a reasonable duration. We have applied and reinforced these teachings in a few prior opinions. Compare *Rabin v. Flynn*, 725 F.3d 628, 633–35 (7th Cir. 2013) (concluding that a 90-minute *Terry* stop did not exceed scope or durational limits where officers were verifying the legitimacy of an individual's firearm license and the delay occurred for reasons outside of the officers' control); *Bullock*, 632 F.3d at 1015 (determining that a 30- to 40-minute detention while police executed a search warrant was reasonable when there was no indication that the officers unnecessarily prolonged the search); *United States v. Adamson*, 441 F.3d 513, 521 (7th Cir. 2006) (concluding that a 25-minute delay was reasonable to investigate whether an individual was taking part in drug activity in a motel room given the number of subjects and their reluctance to tell officers their names or why they were at the motel), and *United States v. Vega*, 72 F.3d 507, 515–16 (7th Cir. 1995) (determining that a 62-minute delay was reasonable

given the defendant initially consented to a search of a garage but then changed his mind and a drug-sniffing dog was called to examine the defendant's car), with *Moya v. United States*, 761 F.2d 322, 326–27 (7th Cir. 1984) (applying *Place* and concluding that a three-hour detention of luggage was unreasonable where there was no explanation for why it took that long to transport the luggage from one terminal to another for drug testing).

III

When reviewing a district court's denial of a motion to suppress, we review factual questions for clear error and legal questions, including mixed questions of law and fact, *de novo*. See *United States v. Mojica*, 863 F.3d 727, 731 (7th Cir. 2017). Having taken our own fresh look at the record, we see no error in the district court's rulings.

A

What the police saw upon arriving at the Goodwill back parking lot that Friday ***554** morning was plenty suspicious. They observed Reedy, an individual with a lengthy criminal history, wearing a bulletproof vest and sitting in a car with a two-way walkie-talkie, crowbar, and open knife within arm's reach on the floorboard. Sergeant Dohms testified at the suppression hearing that these observations left him suspicious that Reedy was part of ongoing criminal activity. That suspicion only heightened when Reedy, upon being asked what he was doing, said he was waiting for his friend Jason who had left to visit another friend in a nearby neighborhood that did not have parking. The police doubted Reedy's explanation, and by that point had "specific and articulable facts which, taken together with rational inferences," gave the officers reasonable suspicion to believe that criminal activity was afoot. *Terry*, 392 U.S. at 21, 88 S.Ct. 1868. On these facts, the police had ample authority to direct Reedy to step out of his car and to subject him to further questioning and investigation consistent with *Terry*.

B

Nor do we see any unreasonable delay in the police's execution of the *Terry* stop. Officer Johnson, Officer Farley, and Sergeant Dohms arrived at the Goodwill parking area between 8:30 a.m. and 8:33 a.m. Within approximately 10 to 15 minutes, Officer Dohms decided to reengage the search for Harding and directed his colleagues not to let Reedy leave. The district court estimated that the police found Harding within approximately 20 to 40 minutes, with his arrest for drug possession occurring shortly after—sometime between 9:05 a.m. and 9:25 a.m. And Reedy was formally placed under arrest at 10:08 a.m. Overall, then, about 90 minutes elapsed between the beginning of Reedy's detention and when the police formally arrested him.

While it is unfortunate that the record does not bear out the timing with greater specificity, what we do know with confidence is that the duration of the *Terry* stop was reasonable under the circumstances. Nothing about the timeline or sequence of events suggests delay by the police. To the contrary, the facts found by the district court make clear that "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly" that a burglary may be underway. *Sharpe*, 470 U.S. at 686, 105 S.Ct. 1568. The officers pursued an investigation by fanning out to find Harding, which took no more than 20 to 40 minutes after first detaining Reedy. From there Sergeant Dohms advanced the investigation by questioning Harding, interviewing the homeowner, and searching Harding's backpack with his consent. All of this constitutes a reasonable response to the situation the police confronted upon first encountering Reedy.

C

This same sequence of events supplied the police with the probable cause necessary to arrest Reedy. Whether probable cause exists depends upon the reasonable conclusions drawn from the facts known to the arresting officer at the time of the arrest. See *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). And an "arrest may be supported by probable cause that the arrestee committed any offense, regardless of the crime charged or the crime the officer thought had been committed." *United States v. Shields*, 789 F.3d 733, 745 (7th Cir. 2015); see *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) ("An arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.").

***555** At the time of Harding's arrest, the officers had probable cause to believe that, at the very least, Reedy possessed burglarious tools in violation of Wisconsin law. See Wis. Stat. § 943.12 (requiring the personal possession

of any device used for breaking into a building or room, and the intent to use the device to break into the building or room and to steal there-from). The officers' initial suspicion at the time of the *Terry* stop turned into probable cause as the investigation advanced, foremost once they encountered Harding in the nearby backyard, heard his implausible yardwork explanation, found him with a walkie-talkie tuned like Reedy's to channel 13, and also located the bolt cutters, latex gloves, shotgun shells, knives, rocks, and methamphetamine in his backpack. The totality of this information supplied the police with probable cause to arrest Reedy, at minimum, for possessing burglarious tools.

Reedy urges a different view, contending that he was under arrest from the moment the police ordered him out of his car and told him he could not leave as they went to look for Harding. The shortcoming with Reedy's position, however, is that it gives no effect to *Terry*, which affirmatively permits brief detentions based on reasonable suspicion that criminal activity is afoot. See 392 U.S. at 21–22, 88 S.Ct. 1868. Reedy's detention while officers investigated his suspected criminal activity was reasonable under the circumstances. And nothing in the analysis changes because multiple armed officers were present during the *Terry* stop. See *Bullock*, 632 F.3d at 1016.

Reedy also maintains that the police lacked probable cause to arrest him for violating Wisconsin's prohibition on possessing burglarious tools because that offense requires proof of burglarious intent. He insists that intent was lacking—at least at the moment the police ordered him from his car and kept him from leaving the scene. Not so in our view.

The law requires only reasonable suspicion of criminal activity, not probable cause, to initiate the *Terry* stop. And as the encounter and investigation continued, the facts and circumstances allowed the police to reasonably infer Reedy's intent. See *Dollard v. Whisenand*, 946 F.3d 342, 355 (7th Cir. 2019) ("[A]lthough a police officer must have 'some evidence' on an intent element to demonstrate probable cause, an officer need not have the 'same type of specific evidence of each element of the offense as would be needed to support a conviction.' " (citations omitted)). The police had more than enough to arrest Reedy, at minimum, for possessing burglarious tools.

D

We close with the brief observation that the probable cause to arrest Reedy brought with it the authority to search the Kia. Although warrantless searches are generally *per se* unreasonable, they are subject to "a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). One such exception authorizes a warrantless search of a vehicle "incident to a recent occupant's arrest *only* if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351, 129 S.Ct. 1710 (emphases added).

Gant's second prong applies here. Once the police brought Harding back to the Goodwill, the initial *Terry* stop of Reedy effectively turned into an arrest ***556** supported by probable cause for, at minimum, possession of burglarious tools. It matters not that Reedy was never formally arrested for any burglary-related offenses. See *id.* at 353, 129 S.Ct. 1710 (Scalia, J., concurring) ("I would hold that a vehicle search incident to arrest is *ipso facto* 'reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.").

From what the police saw and learned during their encounters with Reedy and Harding, the officers had every reason to believe the Kia contained further evidence of burglary-related offenses. It takes no imagination for an officer to reasonably believe that still more tools to commit burglary would be found in the car. The police in no way offended the Fourth Amendment by searching Reedy's car incident to his arrest and discovering his shotgun.

For these reasons, we AFFIRM.

All Citations

989 F.3d 548

136 F.3d 670
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellant,

v.

Mark ALBERS; Jim T. Freegard; David Moran; Erin Moran; David Pierce; Carmel Presse; Lyle Presse J.; Jeff Schabs; Mark Sheehan; Kirk Smith; David M. Strobel; Steve Van Horn, Defendants–Appellees.

No. 96–10561.
|
Submitted Sept. 16, 1997.*
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Decided Feb. 17, 1998.
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As Amended on Denial of Rehearing March 20, 1998.

Synopsis

Government appealed from order of that United States District Court for the District of Arizona, Roger G. Strand, J., suppressing evidence seized during search of defendant's houseboat. The Court of Appeals, Kozinski, Circuit Judge, addressing an issue of first impression held that: (1) vehicle exception to warrant requirement applied to search of defendant's houseboat; (2) National Park Service ranger had probable cause to believe that boat was being used for illegal BASE (Building Antenna Span and Earth) jumping; (3) ranger had probable cause to seize videotapes and film found during his search of boat; and (4) ranger was not required to view videotapes and film at scene of search.

Reversed.

Attorneys and Law Firms

***672** Scott Bales, Assistant United States Attorney, Phoenix, AZ, for plaintiff-appellant.

Fred M. Morelli, Jr., Aurora, IL, for defendants-appellees.

Appeal from the United States District Court for the District of Arizona; Roger G. Strand, District Judge, Presiding. D.C. No. CR–95–00448–RGS.

Before KOZINSKI, MAYER** and FERNANDEZ, Circuit Judges.

Opinion

KOZINSKI, Circuit Judge:

National Park Service rangers discovered Mark Albers and his friends (collectively, "Albers") in a rented houseboat floating on Lake Powell, Arizona. Suspecting Albers was BASE jumping[1] in a national recreation area, a federal crime, the rangers searched the houseboat. During the search they seized videotapes and undeveloped film as well as parachutes, helmets and other equipment. Albers was arrested and charged with violating 36 C.F.R. §§ 2.17(a)(3) and 2.34(a)(4). He moved to suppress the evidence seized by the rangers; the district court granted the motion as to the videotapes and film, reasoning that the rangers should have examined them at the time and place of the search, rather than taking them away and viewing them several days later. In this interlocutory appeal, the government argues that the film and videotapes fall within the closed container rule of *United States v. Johns,* 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985). Because we may affirm on any basis supported by the record, *Rosenbaum v. Hartford Fire Ins. Co.,* 104 F.3d 258, 261 (9th Cir.1996), Albers challenges the search and seizure on other grounds as well.[2]

Albers claims that the entire houseboat search was illegal because the rangers did not first obtain a search warrant. The law is well settled that "absent exigent circumstances, a warrantless entry to search for ... contraband is unconstitutional even when ... there is probable cause to believe that incriminating evidence will be found within." *Payton v. New York,* 445 U.S. 573, 587–88, 100 S.Ct. 1371, 1381, 63 L.Ed.2d 639 (1980). But there are exceptions. The government asserts-and the district court held-that the lack of a warrant did not render the search illegal because houseboats are covered by the vehicle exception to the warrant requirement.

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), held that warrantless searches of automobiles were justified "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of

the locality or jurisdiction in which the warrant must be sought." *Id.* at 153, 45 S.Ct. at 285. Later Supreme Court cases found a second rationale: "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's ***673** home or office." *South Dakota v. Opperman,* 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976). This is so because "[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *Id.* at 368, 96 S.Ct. at 3096.

No Supreme Court case directly extends the vehicle exception to houseboats, but in *California v. Carney,* 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), the Court came close when it held that a readily mobile motor home could be searched without a warrant because both justifications for the vehicle exception applied:

> While it is true that respondent's vehicle possessed some, if not many of the attributes of a home, it is equally clear that the vehicle falls clearly within the scope of the exception laid down in *Carroll* and applied in succeeding cases. Like the automobile in *Carroll,* respondent's motor home was readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police. Furthermore, the vehicle was licensed to operate on public streets; was serviced in public places; ... and was subject to extensive regulation and inspection.

Carney, 471 U.S. at 393, 105 S.Ct. at 2070 (internal citations and quotation marks omitted). Though a motor home has the characteristics of both a home and a motor vehicle, it is the latter characteristics that govern in applying the Fourth Amendment's warrant requirement.

Whether Albers' houseboat falls within the vehicle exception depends on whether, for purposes of *Carney,* houseboats are the same as motor homes. This is a question of first impression in our circuit but one the Tenth Circuit has resolved without much difficulty. *See United States v. Hill,* 855 F.2d 664, 668 (10th Cir.1988). In *Hill,* defendants sought to suppress evidence obtained during the warrantless search of their houseboat. *Id.* at 666. Noting that no case dealt with houseboat searches, *Hill* looked to cases involving motor vehicle searches, focusing particularly on *Carney. Id.* at 667. Because houseboats, like motor homes, are readily capable of functioning as both vehicles and homes, and the Supreme Court considered and resolved the tension created by this dual nature, *Hill* concluded that *Carney* controls. *Id.* at 668. We agree with the Tenth Circuit and hold that the vehicle exception applies to houseboats so long as *Carney* 's requirements are met.

Carney first asks whether the vehicle was "obviously readily mobile by the turn of an ignition key, if not actually moving." *Carney,* 471 U.S. at 393, 105 S.Ct. at 2070. Albers' houseboat was found in open public waters, obviously mobile. *Carney* also asks whether there was "a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling[.]" *Id.* Albers had such a reduced expectation of privacy because at any time an authorized person could have stopped and boarded his boat "to determine compliance with regulations pertaining to safety equipment and operation." *See* 36 C.F.R. § 3.5(a). Indeed, the government's traditional power to board a vessel is far greater than its power to enter a motor home or a car, *see United States v. Villamonte–Marquez,* 462 U.S. 579, 592, 103 S.Ct. 2573, 2581–82, 77 L.Ed.2d 22 (1983) (suspicionless boarding of ships for inspection of documents not contrary to Fourth Amendment). Finally, *Carney* asks whether "the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle." 471 U.S. at 393. We recognize that in many situations it will be objectively apparent that a houseboat is being used as a home and not a vehicle.[3] However, in *Hill*, the Tenth Circuit noted that "an objective observer would conclude that a moving boat navigating the waters of a large lake on a cold winter night was not being used as a residence." 855 F.2d at 668. Similarly, since Albers had moved his houseboat to open waters on a large lake, an objective observer would conclude that he was using the houseboat as a vehicle. *Carney* 's requirements were satisfied and Albers' houseboat could be searched without a warrant.

Albers argues that even if the rangers could search the boat without a warrant, this particular search and seizure was unreasonable because they lacked probable cause. "Under the vehicle exception to the warrant requirement, only the prior approval of the ***674** magistrate is waived; the search otherwise must be such as the magistrate could authorize [i.e., there must be probable cause]." *Carney,* 471 U.S. at 394, 105 S.Ct. at 2071 (internal citations and quotation marks omitted). Probable cause exists when there is fair probability that evidence of a crime will be found in a particular place. *See Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); *United States v. Alvarez,* 899 F.2d 833, 839 (9th Cir.1990). Despite Albers' claims to the

contrary, there was probable cause to suspect that evidence of BASE jumping would be found on the houseboat. Ranger Christopher Cessna saw Albers' boat below a cliff known for BASE jumping; earlier that day he had received reports of BASE jumping in the area; damp BASE jumping equipment was in plain view on the boat's deck; people on the boat seemed nervous and refused to answer Cessna's questions. Cessna knew all this before he boarded Albers' boat, and therefore had probable cause to believe that the boat contained evidence of BASE jumping.

Probable cause also supported the seizure of the videotapes and film. The videotapes were labeled "Throw Mama from the Plane," "BASE Jump Copy," and "Bungi BASE Jump." Cessna testified that BASE jumpers often videotape their illegal activities, which was consistent with the presence of a video camera on the boat. Cessna had sufficient reason to believe that the tapes and film contained evidence of BASE jumping, so seizing them was constitutional.

The district court suppressed the videotapes and film on the ground that the rangers should have viewed them at the scene, rather than seizing them and then viewing them several days later. This ruling was error. The Supreme Court in *United States v. Johns,* 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985), refused to hold that police must immediately search all containers and packages discovered during a warrantless vehicle search. "This result would be of little benefit to the person whose property is searched, and where police officers are entitled to seize the container and continue to have probable cause to believe that it contains contraband, we do not think that delay in the execution of the warrantless search is necessarily unreasonable." *Id.* at 487, 105 S.Ct. at 886–87. The containers in *Johns* were plastic packages of marijuana, not videotapes and film, but the difference cuts entirely against Albers. Whereas the contents of most containers can be examined with relative ease at the scene, videotapes and film require specialized equipment and often take many hours to view. The justification for postponing examination is thus stronger for tapes and film than for ordinary closed containers.

When there is probable cause to suspect that videotapes and film contain evidence of a crime, they need not be viewed at the scene of the search. As *Johns* also held, however, the delay must be reasonable in light of all the circumstances. *See Johns,* 469 U.S. at 487, 105 S.Ct. at 886–87. The seven to ten day delay in viewing the videotapes and film in Albers' case was not unreasonable, especially given that the film had to be developed before it could be examined. *See Cooper v. California,* 386 U.S. 58, 61–62, 87 S.Ct. 788, 790–91, 17 L.Ed.2d 730 (1967) (upholding warrantless search seven days after seizure).

REVERSED.

All Citations

136 F.3d 670, 1998 A.M.C. 1017, 98 Cal. Daily Op. Serv. 1125

Footnotes

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R.App. P. 34(a); 9th Cir. R. 34–4.

** The Honorable H. Robert Mayer, United States Court of Appeals for the Federal Circuit, sitting by designation. Judge Mayer assumed the position of Chief Judge on December 25, 1997.

1 BASE (Building Antenna Span and Earth) jumping refers to parachuting from fixed objects. In this case, Albers allegedly parachuted from canyon walls into Lake Powell.

2 We are aware that in *United States v. Becker,* 929 F.2d 442, 447 (9th Cir.1991), we refused to consider an alternate theory to uphold a suppression order. However, we recognized that we could consider alternate grounds and declined to do so because the defendant sought to have us suppress "not just the evidence the district court suppressed, but all evidence seized during the searches[.]" *Id.* Here we are asked to consider the alternate ground for the sole purpose of upholding the specific suppression of evidence which the government appeals.

3 A houseboat not independently mobile or one that is permanently moored would present a different case.

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16 F.3d 582
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Joseph GASTIABURO, a/k/a Joe Gastiaburo, a/k/a Joseph Gastiburo, a/k/a Joseph Menendez, a/k/a Joseph Gastibury, a/k/a Robert Julio Gastiaburo, a/k/a Joseph Mendez, a/k/a Joseph Rodriguez, Defendant–Appellant.

No. 92–5513.
|
Argued Oct. 28, 1993.
|
Decided Feb. 8, 1994.

Synopsis
Defendant was convicted of possession of drugs with intent to distribute, carrying firearm during and in relation to drug trafficking crime, and possession of firearm by convicted felon after jury trial in the United States District Court for the Eastern District of Virginia, Thomas Selby Ellis III, J. Defendant appealed. The Court of Appeals, Murnaghan, Circuit Judge, held that: (1) warrantless search of defendant's automobile after it had been impounded and he had been arrested came within automobile exception to warrant requirement; (2) opinion testimony of police sergeant as to defendant's intent to distribute drugs found in his car was not plain error; (3) police sergeant's testimony as to attributes of persons involved in distribution of drugs and "tools of trade" was proper expert opinion testimony; and (4) district judge's questioning of sole defense witness as to whether he had ever been convicted of felony, although inappropriate, was not so prejudicial as to deny fair trial and to permit review on appeal absent objection at trial.

Affirmed.

Attorneys and Law Firms

***584 ARGUED:** Fred Warren Bennett, Baltimore, Maryland, for Appellant. Russel N. Jacobson, Special Assistant United States Attorney, Alexandria, Virginia, for Appellee.

ON BRIEF: Kenneth E. Melson, United States Attorney, Marcus J. Davis, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Before MURNAGHAN and NIEMEYER, Circuit Judges, and YOUNG, Senior U.S. District Judge for the District of Maryland, sitting by designation.

OPINION

MURNAGHAN, Circuit Judge:

After pulling over defendant-appellant, Joseph Gastiaburo, for a routine traffic stop, a Virginia State Trooper conducted a warrantless consent search of Gastiaburo's car. The search produced $10,000 cash, drug paraphernalia, and several grams of cocaine base ("crack cocaine"). The state police arrested Gastiaburo and impounded his car.

Five weeks later, after receiving a tip from an acquaintance of Gastiaburo, the police conducted a warrantless search of a hidden compartment in the car's dashboard and seized a loaded semiautomatic pistol and a much larger quantity of crack cocaine. The district court denied Gastiaburo's motion to suppress the evidence seized during the latter search.

At trial under an indictment charging (a) possession of drugs with intent to distribute, (b) carrying a firearm during and in relation to a drug trafficking crime, and (c) possession of a firearm by a convicted felon, the government put a law enforcement officer on the stand as an expert on drug trafficking practices and techniques. Over and beyond direct and cross-examination, the district judge asked the government's expert several questions; later, he asked the defense's sole witness several questions, as well. The jury convicted Gastiaburo on all counts, and the district judge sentenced him to 322 months imprisonment. He has appealed.

I. The Facts

At midday on October 8, 1991, Joseph Gastiaburo and a passenger, Dina Viola, were heading southbound on Interstate 95. Virginia State Police Trooper Mark Cosslett pulled Gastiaburo over for reckless driving. Adhering to state police procedures for a routine traffic stop, Cosslett asked

Gastiaburo for his license and registration and also asked if he was transporting any drugs or weapons. Gastiaburo replied that he was not, and asked Cosslett whether he would like to take a look in the vehicle. Cosslett replied, "You don't mind if I take a look through your vehicle?" Gastiaburo answered, "No, go ahead." Cosslett reiterated his request and explicitly confirmed that Gastiaburo had no objections to a search of both the vehicle and any containers therein.

Following those repeated consents to a search, Cosslett placed Gastiaburo in the police cruiser, wrote out a traffic citation, and waited for a backup officer. After the backup arrived, Gastiaburo was again asked for permission to search the vehicle, including any containers, and he again consented. With Gastiaburo sitting on the interstate guardrail adjacent to the car, Cosslett commenced his search. The search produced, among other things, a set of hand scales, rolling papers, razor blades, a knife with a retractable blade, a large number of small plastic baggies, an address book with various names and financial notations, a paging device or "beeper," $10,000 in cash (folded into $100 increments), a box of .25 caliber ammunition, and a black leather zippered pouch containing twenty-one small zip-locked plastic baggies, each containing about one-fifth of a gram of a rock-like substance that was subsequently determined to be crack cocaine.

The backup officer arrested Gastiaburo and drove him to a nearby detention center. His car was seized for forfeiture by the Commonwealth of Virginia and removed to an impoundment lot at the regional State Police headquarters, where it was secured by parking state vehicles around it. The next morning an inventory search of the impounded car produced no additional contraband.

On November 15, 1991, Cosslett and Viola, Gastiaburo's passenger at the time of arrest, ***585** met at the Prince William County Courthouse. Viola inquired whether he had found the gun. When Cosslett said that he had not, Viola told him that there was a hidden compartment located behind the radio in the console of Gastiaburo's car, and that the compartment contained drugs, money, and a handgun.

Cosslett promptly went to the impound lot and, without obtaining a warrant, searched for and located the hidden compartment. He found and seized a loaded, .25 caliber semiautomatic pistol and, wrapped in aluminum foil and then in brown paper lunch bags, a lump of rock-like substance that was subsequently determined to be a 24–gram "rock" of crack cocaine.

A grand jury of the United States District Court for the Eastern District of Virginia returned the above-mentioned three-count indictment against Gastiaburo. On April 3, 1992, a suppression hearing took place. After listening to conflicting testimony from Gastiaburo and Cosslett, the district judge resolved the credibility conflicts in Cosslett's favor and denied all of Gastiaburo's motions, including a motion to suppress the gun and the crack cocaine that Cosslett had seized during his warrantless search of the impounded car on November 15, 1991.

On April 22, 1992, Gastiaburo was tried before a jury in Judge Ellis's courtroom. The government called Cosslett, who gave testimony substantially similar to his earlier testimony at the suppression hearing. The government also called Sergeant Floyd Johnston of the U.S. Park Police as an expert in the field of drug trafficking practices and techniques. Among other things, Johnston examined the various government exhibits that had been seized from Gastiaburo's car and testified that they were generally consistent with crack cocaine distribution, rather than with mere personal use of the drug. In response to questions from the bench, Johnston also testified about the quantities of crack cocaine consumed by typical addicts.

Gastiaburo called only one witness, Charles J. Pucci, his brother-in-law. Pucci testified that Gastiaburo had visited him in New York City shortly before the arrest, and that he had given Gastiaburo $10,000 in loose cash to pay a debt to a family member in Florida. The court asked Pucci several questions about the cash, and also inquired about Pucci's occupation. Judge Ellis then asked whether Pucci had ever been convicted of a felony. Pucci responded, "I have not."

The jury returned guilty verdicts on all three counts. The district court imposed a sentence of 322 months imprisonment plus five years of supervised release, $10,000 forfeiture, and $150 in special assessments. Gastiaburo's appeal followed.

II. The Gun and Cocaine Seized on November 15, 1991

Gastiaburo has contended that the gun and the 24–gram rock of crack cocaine that the police seized from his car on November 15, 1991 should have been suppressed because they were obtained without a warrant, in violation of his Fourth Amendment rights. In response the government has argued that the district court's denial of Gastiaburo's motion

to suppress should be affirmed on any of four grounds: (1) the evidence was seized during a valid consent search; (2) the evidence was seized during a valid inventory search; (3) the police had probable cause to believe the search would uncover contraband (*i.e.,* the so-called "automobile exception" to the warrant requirement); or (4) the evidence was seized during a valid search of a vehicle subject to forfeiture. The third argument, based on the "automobile exception" to the warrant requirement, is clearly correct. Because we review such a mixed question of law and fact *de novo, see, e.g., United States v. Moore,* 817 F.2d 1105, 1106–08 (4th Cir.), *cert. denied,* 484 U.S. 965, 108 S.Ct. 456, 98 L.Ed.2d 396 (1987), the district court's decision not to suppress the evidence seized on November 15, 1991 should be affirmed.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. Searches conducted without a warrant issued by a judge or magistrate upon probable cause "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and ***586** well-delineated exceptions." *California v. Acevedo,* 500 U.S. 565, ——, ——, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991) (citations and internal quotation marks omitted); *see also United States v. Turner,* 933 F.2d 240, 244 (4th Cir.1991). At least since 1925, when the Supreme Court handed down its decision in *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the federal judiciary has recognized an "automobile exception" to the warrant requirement: it may be reasonable and therefore constitutional to search a movable vehicle without a warrant, even though it would be unreasonable and unconstitutional to conduct a similar search of a home, store, or other fixed piece of property. *See id.* at 153, 158–59, 45 S.Ct. at 285, 287.

The Supreme Court delivered its most recent exposition on the "automobile exception" in *California v. Acevedo, supra.* The *Acevedo* Court held that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." 111 S.Ct. at 1991. "[T]he scope of a warrantless search of an automobile is 'no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause.' " *United States v. $29,000—U.S. Currency,* 745 F.2d 853, 855 (4th Cir.1984) (quoting *United States v. Ross,* 456 U.S. 798, 823, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982)). With or without warrant, the scope of the search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found. For example, probable cause to believe that a container placed in the trunk of an automobile contains contraband does not justify a search of the entire car. *See Acevedo,* 500 U.S. at ——, 111 S.Ct. at 1991 (citing *Ross,* 456 U.S. at 824, 102 S.Ct. at 2172).

In the present case, as of November 15, 1991, the police had probable cause to believe that one particular area within Gastiaburo's car contained as-yet undiscovered contraband. On that date, Dina Viola, Gastiaburo's passenger at the time of his arrest, met Cosslett at the Prince William County Courthouse and told him that there was a hidden compartment behind the radio in the console of Gastiaburo's car and that the compartment contained additional drugs and money, as well as a handgun. Those facts are uncontroverted, and they would have more than sufficed to justify the issuance of a warrant by a magistrate. Therefore, they also sufficed to justify a warrantless search of the area behind the radio.

Furthermore, the facts in the record indicate no overreaching by the police. As of November 15, 1991, the police apparently had probable cause to believe that contraband remained hidden only where Viola had told Cosslett to look. Appropriately, Cosslett confined his search to that area. And Gastiaburo does not claim that the search of November 15, 1991 covered a broader scope than that contained in the tip that gave Cosslett probable cause. Therefore, the November 15, 1991 search complied with the requirements of the Fourth Amendment.

Gastiaburo has made two responses to the government's "automobile exception" argument. First, he has contended that impoundment effectively transformed his car from a movable vehicle into a "fixed piece of property," thus making the automobile exception to the warrant requirement inapplicable. However, the justification to conduct a warrantless search under the automobile exception does not disappear merely because the car has been immobilized and impounded. *See United States v. Johns,* 469 U.S. 478, 484, 105 S.Ct. 881, 885, 83 L.Ed.2d 890 (1985); *Florida v. Meyers,* 466 U.S. 380, 382, 104 S.Ct. 1852, 1853, 80 L.Ed.2d 381 (1984) (per curiam); *Michigan v. Thomas,* 458 U.S. 259, 261, 102 S.Ct. 3079–3080–81, 73 L.Ed.2d 750 (1982) (per curiam); *see also Turner,* 933 F.2d at 244; *$29,000—U.S. Currency,* 745 F.2d at 855. Under the Supreme Court's precedents, the fact that impoundment may have made it virtually impossible for anyone to drive the car away or to tamper with its contents is irrelevant to the constitutionality

of a warrantless search under the circumstances of the present case. *See, e.g., Thomas,* 458 U.S. at 261, 102 S.Ct. at 3081.

Second, Gastiaburo has noted that thirty-eight days transpired between the seizure ***587** of his car on October 8, 1991 and the warrantless search in question, and has argued that the delay violated the "temporal limit on the automobile exception" and that "it was a *per se* unreasonable delay." Gastiaburo's "delay" argument also lacks merit. Not a single published federal case speaks of a "temporal limit" to the automobile exception. The Supreme Court has repeatedly stated that a warrantless search of a car (1) need not occur contemporaneously with the car's lawful seizure and (2) need not be justified by the existence of exigent circumstances that might have made it impractical to secure a warrant prior to the search. *See Acevedo,* 500 U.S. at ——, 111 S.Ct. at 1986 (explaining that the police can search later whenever they could have searched earlier, had they so chosen) (describing the Court's reasoning in *Chambers v. Maroney,* 399 U.S. 42, 51–52, 90 S.Ct. 1975, 1981–82, 26 L.Ed.2d 419 (1970)); *Johns,* 469 U.S. at 484–85, 105 S.Ct. at 885–86; *Thomas,* 458 U.S. at 261–62, 102 S.Ct. at 3080–81. Therefore, the passage of time between the seizure and the search of Gastiaburo's car is legally irrelevant.

Moreover, Cosslett's actual "delay" here was minimal: he conducted the search on the very same day that he first had probable cause to believe contraband could be found behind the dashboard of Gastiaburo's car. Cosslett testified at the suppression hearing that, upon learning of the hidden compartment in Gastiaburo's dashboard, he proceeded "to the headquarters, obtained the keys from the evidence custodian, removed the vehicles [that were blocking in Gastiaburo's car], and checked the hidden compartment." Such an expeditious search cannot be deemed "*per se* unreasonable." Rather, it falls squarely within the specifically established and well-delineated "automobile exception" to the Fourth Amendment's warrant requirement.

III. Expert Testimony

Gastiaburo next has contended that the district court erred in admitting expert testimony from Sergeant Johnston that included (1) an opinion as to Gastiaburo's intent, allegedly in violation of Rule 704(b) of the Federal Rules of Evidence; and (2) matters within the common understanding of the jurors, allegedly in violation of Rule 702.

A. Johnston's testimony on "intent to distribute." The prosecutor had asked Johnston: "Would you have an opinion based on your training and experience what that crack cocaine [that the police had seized from the hidden compartment in Gastiaburo's car and the twenty-one zip-locked plastic baggies, each containing a "hit" of crack cocaine], ... were possessed for, taking all the elements into consideration?" Johnston replied: "Clearly, based on my opinion, my training and experience, it was certainly possessed with the intent to distribute." Gastiaburo's trial attorney did not object. On appeal, Gastiaburo has claimed that Johnston's answer provided expert opinion testimony on Gastiaburo's intent in a specific-intent crime, a violation of Federal Rule of Evidence 704(b).

Because Gastiaburo did not object at trial, we review the admission of Johnston's expert testimony for plain error. Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed.R.Crim.P. 52(b). The Supreme Court recently interpreted Rule 52(b) to require not only the existence of an "error" (*i.e.,* a "[d]eviation from a legal rule" that the defendant has not waived), but also that the error be "plain" (*i.e.,* "clear" or, equivalently, "obvious" under the current applicable law). *United States v. Olano,* 507 U.S. 725, ——, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993) (citations and internal quotation marks omitted).

Rule 704(b) of the Federal Rules of Evidence provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

***588** Fed.R.Evid. 704(b). Rule 704(b) was enacted in the wake of the attempted assassination of President Reagan and the murder of John Lennon, and was an attempt to constrain psychiatric testimony on behalf of defendants asserting the insanity defense. *See generally* Anne Lawson Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense,* 72 Cornell L.Rev. 620 (1987). The application of the same rule in an entirely different context—a law enforcement officer's expert opinion testimony on behalf of the government at the trial of an alleged drug dealer—is murky at best.

Was Johnston in fact "testifying with respect to the mental state or condition of a defendant in a criminal case"? Did he actually "state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element" of the crime of possession of cocaine with intent to distribute? The testimony lends itself to the interpretation that possession of the quantity of crack cocaine seized from Gastiaburo's car—with the individual "hits" packaged in twenty-one small zip-locked baggies, and the larger "rock" in foil and paper bags—was consistent with the distribution of cocaine, rather than with mere personal use of the drug.

In any event, Gastiaburo's failure to object at the trial made the relevant inquiry for us whether Judge Ellis committed a "plain error" under Rule 52(b). The error, if any, was not "plain" (or "clear" or "obvious"). *Cf. Olano,* 507 U.S. at ——, 113 S.Ct. at 1777. Most appellate panels have refused to find error in the admission of expert testimony on intent to distribute controlled substances. *See, e.g., United States v. Valentine,* 984 F.2d 906, 910 (8th Cir.), *cert. denied,* 510 U.S. 828, 114 S.Ct. 93, 126 L.Ed.2d 60 (1993); *United States v. Chin,* 981 F.2d 1275, 1279 (D.C.Cir.1992), *cert. denied,* 508 U.S. 923, 113 S.Ct. 2377, 124 L.Ed.2d 281 (1993); *United States v. Williams,* 980 F.2d 1463, 1465–66 (D.C.Cir.1992); *United States v. Wilson,* 964 F.2d 807, 810 (8th Cir.1992); *United States v. Gomez–Norena,* 908 F.2d 497, 502 (9th Cir.), *cert. denied,* 498 U.S. 947, 111 S.Ct. 363, 112 L.Ed.2d 326 (1990); *United States v. Alvarez,* 837 F.2d 1024, 1030–31 (11th Cir.), *cert. denied,* 486 U.S. 1026, 108 S.Ct. 2003, 2004, 100 L.Ed.2d 234, 235 (1988).[*] One recent D.C. Circuit decision did find that the admission of expert testimony on the defendant's intent to distribute violated Rule 704(b), but went on to hold that the error was not "plain" under the settled law of the Supreme Court or the D.C. Circuit, as it stood at the time of the trial. *See United States v. Mitchell,* 996 F.2d 419, 421–23 (D.C.Cir.1993).

B. Johnston's other testimony. Gastiaburo also has contended that the district court should have rejected various parts of Johnston's testimony as insufficiently helpful for the trier of fact under Federal Rule of Evidence 702. On direct examination, Johnston testified, over defense counsel's objection, that it is not uncommon for people transporting controlled substances to grant consent to law enforcement officers to search their possessions or their persons. He also testified about the attributes of persons involved in the distribution of drugs and the "tools of the trade"—*e.g.,* beepers, address books, the quantities of drugs possessed by dealers, and so on. During defense counsel's cross-examination, Judge Ellis interjected, asking Johnston about half-a-dozen questions. In response, Johnston testified about addicts' typical levels of crack consumption, typical patterns of addiction, and typical quantities of crack that a user will purchase and hold at any given moment. Although Gastiaburo did not object at trial to the colloquy between Judge Ellis and Johnston, he has complained on appeal that the judge's questions violated Rule 614 of the Federal Rules of Evidence, *see infra* Part IV, and that the Johnston's answers violated Rule 702.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a ***589** fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The trial judge has broad discretion under Rule 702. *See Hamling v. United States,* 418 U.S. 87, 108, 94 S.Ct. 2887, 2903, 41 L.Ed.2d 590 (1974) ("[T]he District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony.") (citations omitted); *cf. United States v. Ham,* 998 F.2d 1247, 1252 (4th Cir.1993).

As then-Judge Ruth Bader Ginsburg has explained: "In accord with the commodious standard of Federal Rule of Evidence 702, expert testimony on the *modus operandi* of criminals 'is commonly admitted,' particularly regarding the methods of drug dealers." *Chin,* 981 F.2d at 1279 (quoting *United States v. Dunn,* 846 F.2d 761, 763 (D.C.Cir.1988)); *see also Mitchell,* 996 F.2d at 423 ("Federal courts often allow expert testimony on narcotics operations to familiarize jurors with the variety of methods by which drug dealers attempt to pursue and conceal their activities....") (citing *Dunn,* 846 F.2d at 763).

We have repeatedly upheld the admission of law enforcement officers' expert opinion testimony in drug trafficking cases. *See, e.g., United States v. Safari,* 849 F.2d 891, 895 (4th Cir.) (upholding the admission of expert testimony on the size of an average dose of heroin, because, "[w]hile not usurping the function of the jury, this testimony aided the jury during its deliberations, for most laymen are not familiar with the quantity, purity, and dosage units of heroin"), *cert. denied,* 488 U.S. 945, 109 S.Ct. 374, 102 L.Ed.2d 363 (1988); *United States v. Monu,* 782 F.2d 1209, 1210–11 (4th Cir.1986) (upholding the admission of two investigative agents' expert

opinion testimony regarding the purity of heroin and heroin distributors' use of triple-beam balance scales). Similarly, in *United States v. Wilson,* 964 F.2d at 809–10, the Eighth Circuit upheld a conviction for possession with intent to distribute and affirmed the admission of a drug enforcement agent's testimony that, based upon his experience and training, 130 grams of methamphetamine (the amount seized from the defendant) was more than generally possessed by mere users of the drug. The Eighth Circuit found no abuse of discretion in admitting the agent's testimony: "Such testimony aids the jury by putting the drug dealer in context with the drug world. It is a reasonable assumption that a jury is not well versed in the behavior and average consumption of drug users." *Id.* at 810 (citation omitted); *see also United States v. Foster,* 939 F.2d 445, 452 (7th Cir.1991) (noting that "jurors are not well versed in the behavior of drug dealers"). Here, too, the district court properly admitted Johnston's expert testimony.

IV. The District Judge's Questioning of Witnesses

Gastiaburo has further contended that he was denied a fair trial because the district judge violated Rule 614 of the Federal Rules of Evidence by improperly questioning witnesses at trial. Gastiaburo has claimed that there was error in the judge's questioning of Charles Pucci, Gastiaburo's brother-in-law and the only witness whom Gastiaburo called at trial. At the end of the government's cross-examination of Pucci, the judge asked him whether he typically sent $10,000 payments in cash via his brother-in-law (Gastiaburo), where he got the cash, what his occupation was, and whether he had ever been convicted of a felony. Gastiaburo did not object to those questions at trial.

Gastiaburo's argument appears to come too late. The plain language of Rule 614(c) of the Federal Rules of Evidence requires objections to the trial judge's interrogation of witnesses "[to] be made at the time or at the next available opportunity when the jury is not present." Fed.R.Evid. 614(c). We, interpreting that rule, have held that "the failure of ... counsel to object to any of [the district judge's] questioning at trial precludes our review of this issue on appeal." *Stillman v. Norfolk & W. Ry. Co.,* 811 F.2d 834, 839 (4th Cir.1987).

Stillman recognized a "limited exception" to the general rule against appellate review " '[w]here a trial judge's comments were so prejudicial as to deny a party an opportunity for a fair and impartial trial.' " ***590** *Id.* (quoting *Miley v. Delta Marine Drilling Co.,* 473 F.2d 856, 857–58 (5th Cir.), *cert. denied,* 414 U.S. 871, 94 S.Ct. 93, 38 L.Ed.2d 89 (1973)). In sketching the contours of that "limited exception," we cited a case in which the judge interrupted the witness to answer the counsel's question himself, referred to the question as one that "any five-year-old idiot" could answer, and then instructed counsel, "Don't waste my time and the jury's on that." *Id.* (internal quotation marks omitted). Even those inflammatory and insulting comments were deemed *not* "sufficiently biased or notorious" to permit appellate review absent any objection at trial. *Id.*

Clearly, none of the questions that Judge Ellis asked of Johnston (a topic dealt with above) even began to approach the level of "bias" or "notoriety" found in the above-cited example. The same can be said of Judge Ellis's questioning of Pucci, with one qualification. Judge Ellis may appear to have overstepped the bounds of proper judicial interrogation when he asked the criminal defendant's sole witness whether he had ever been convicted of a felony. Seen in the printed record, the absence of any particularized, good-faith basis made the question inappropriate.

However, while Judge Ellis's final question of Pucci may have been improvident, it was not so prejudicial as to deny Gastiaburo the opportunity for a fair and impartial trial. Judge Ellis was not requested to retract the question. The answer to it, promptly given, was in the negative. Thus, Gastiaburo's failure to object to Judge Ellis's interrogation during the trial is fatal to his argument on appeal.

V. Ineffective Assistance of Counsel at Sentencing

Finally, Gastiaburo has contended that he was denied the effective assistance of counsel at sentencing when, after he claimed on the record that his trial counsel had been ineffective, his counsel failed to allocute on his behalf.

A claim of ineffective assistance of counsel should be raised by motion under 28 U.S.C. § 2255 in the district court and not on direct appeal, unless it "conclusively appears" from the record that defense counsel did not provide effective representation. *United States v. Fisher,* 477 F.2d 300, 302 (4th Cir.1973) (citing *United States v. Mandello,* 426 F.2d 1021, 1023 (4th Cir.1970)); *see also United States v. DeFusco,* 949 F.2d 114, 120–21 (4th Cir.1991), *cert. denied,* 503 U.S. 997, 112 S.Ct. 1703, 118 L.Ed.2d 412 (1992); *United States v. Percy,* 765 F.2d 1199, 1205 (4th Cir.1985).

In the present case, the record on appeal does not conclusively demonstrate ineffective assistance of counsel. Therefore, we do not now address the issue on direct appeal. Gastiaburo may assert the claim in a § 2255 *habeas* motion, if he so chooses.

VI. Conclusion

Accordingly, the judgment is

AFFIRMED.

All Citations

16 F.3d 582

Footnotes

* The question presented here has only recently been discussed. At the time of Gastiaburo's trial, the cases cited here had not yet been decided and published, with the exceptions of *Gomez–Norena* and *Alvarez*.

792 F.2d 837
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
Charles E. HAMILTON, Defendant-Appellant.
UNITED STATES of
America, Plaintiff-Appellee,
v.
Charles Eugene HAMILTON,
Defendant-Appellant.

Nos. 84-5060, 84-5063.
|
Argued and Submitted Nov. 5, 1985.
|
Decided June 19, 1986.

Synopsis

Defendant was convicted in the United States District Court for the Central District of California, Malcolm M. Lucas, J., of seven counts of armed robbery, and he appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) defendant was not denied effective assistance of counsel; (2) district judge's decision not to recuse himself was not abuse of discretion; and (3) FBI agents could in good faith rely on homeowner's apparent authority to consent to search of motor home which was parked in homeowner's driveway.

Affirmed.

Hug, Circuit Judge, filed opinion concurring in part and dissenting in part.

Cynthia Holcomb Hall, Circuit Judge, filed opinion concurring in part and dissenting in part.

Attorneys and Law Firms

***838** William Fahey, Asst. U.S. Atty., Los Angeles, Cal., for plaintiff-appellee.

Robert L. Allen, Los Angeles, Cal., for defendant-appellant.

Appeal from the United States District Court for the Central District of California.

Before WALLACE, HUG and HALL, Circuit Judges.

Opinion

WALLACE, Circuit Judge:

Hamilton appeals from his conviction on seven counts of armed robbery in violation of 18 U.S.C. § 2113(a), (d). Hamilton argues that he was denied his sixth amendment right to effective assistance of counsel, that the district judge should have recused himself, that he was deprived of the right to be absent from trial, that a photographic spread was unduly suggestive, that parts of three jury instructions were prejudicial, and that the district judge erred in admitting certain evidence. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

On July 12, 1983, a man robbed the Union Federal Savings and Loan of Newbury Park, California. A Ventura County, California, deputy sheriff heard a broadcast reporting that the robbery had occurred and that the suspect was a black man driving a white Cadillac.

A short time thereafter, the deputy sheriff saw a vehicle and driver matching the description given in the broadcast. With the assistance of other law enforcement officers, he stopped the vehicle and ordered the occupants to step out. Hamilton got out of the vehicle, along with Sheila Davis, a female co-defendant. Witnesses at the bank identified Hamilton as the robber, and he was arrested.

The next day, Federal Bureau of Investigation (FBI) agent Ahles contacted Gregory Jones, the owner of the white Cadillac that Hamilton was driving when he was arrested. Jones told agent Ahles that he had loaned the car to Davis for a few hours on the day of the robbery, and that he had gone to Davis's home to look for it when the Cadillac had not been returned. Jones stated that he had observed a motor home at Davis's premises and had noticed people removing articles from the house and placing them within the motor home. Jones gave agent Ahles the license plate number of the motor home and told him that the motor home had been moved and could be found at an address on Van Ness Avenue in Los

Angeles. Agent Ahles determined from an investigation of the license plate number that the owner of the motor home was Frank Crawford.

Agent Ahles notified FBI agents Powers and Flanigan by radio of the location of the motor home and described the evidence he thought the agents would find inside. Agents Powers and Flanigan found the motor home at the Van Ness address. They contacted their office by radio and were advised of the name and address of a third person who was the registered owner of the motor home, and were informed that the registration was not current.

When the agents approached the home, they were greeted by Hamilton's mother, Claudia Cosbie. The motor home was parked in the driveway of Cosbie's home and was attached to the home's electric utilities by an extension cord. The door of the motor home was open and two teenage girls were inside listening to the radio. The agents observed Cosbie enter the motor ***839** home several times; on at least one occasion, Cosbie instructed the two teenage girls to cooperate with the questions of the agents. Cosbie told the agents that she did not know who owned the motor home but that it was driven onto her property by a grandson and that she believed it was owned by Hamilton, her son.

Based on these circumstances, the agents believed that Cosbie had free and complete access to the motor home. Consequently, they asked her if they could search the motor home, and she consented. The search produced several articles of clothing, which later were introduced at trial.

Hamilton was charged in two indictments with ten counts of armed robbery in violation of 18 U.S.C. § 2113(a), (d). Prior to trial, Hamilton filed three motions to relieve his court-appointed counsel and one motion to suppress evidence, all of which were denied. The government's motion to dismiss count four of the first indictment was granted. Counts six and seven of the first indictment were severed prior to trial and later dismissed. A jury found Hamilton guilty of seven counts of armed robbery, and he was sentenced to 40 years in prison.

II

Hamilton first contends that he was denied his sixth amendment right to effective assistance of counsel because his attorney's performance was deficient and prejudicial. *See Strickland v. Washington,* 466 U.S. 668, 685-86, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984) (*Strickland*). Our review of counsel's performance is highly deferential and we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. at 2066.

Hamilton argues that his appointed attorney should not have represented him because they were unable to communicate. Our review of the record indicates, however, that any lack of communication between Hamilton and his attorney prior to trial resulted from Hamilton's unwillingness to cooperate and his efforts to delay the trial. Once trial began, Hamilton cooperated with his attorney, assisted in selecting the jury, made suggestions for cross-examining witnesses, and even complimented his attorney on his efforts to defend him.

Hamilton next argues that his attorney's performance was deficient because he did not object to three jury instructions and to the trial judge's refusal to recuse himself. Since these objections are without merit, *see infra,* Hamilton's attorney did not err in failing to raise them.

Hamilton also contends that his attorney failed to present a defense at the close of the government's case. Hamilton never indicates, however, what evidence should have been presented. Under these facts, all Hamilton's attorney could do was what he did do: cross-examine the government's witnesses. Since Hamilton has failed to prove that his attorney's performance was deficient, we need not address whether it was prejudicial. *See Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069.

III

Hamilton next argues that the district judge should have recused himself because Hamilton appeared before him in a state court proceeding 15 years earlier. We will reverse a district judge's decision not to recuse himself only if the decision was an abuse of discretion. *United States v. DeLuca,* 692 F.2d 1277, 1282 (9th Cir.1982). The district judge stated that he had no recollection of the 15-year-old state court proceeding. We can find no reasonable basis to question the district judge's impartiality, *see* 28 U.S.C. § 455(a); *Trotter v. International Longshoremen's Union, Local 13,* 704 F.2d 1141, 1144 (9th Cir.1983), and the record contains no evidence of bias or prejudice, *see* 28 U.S.C. § 455(b)(1). Therefore, the district judge did not abuse his discretion in declining to recuse himself.

***840** IV

Hamilton also contends that he was deprived of the right voluntarily to absent himself from trial. No cases are cited by Hamilton in support of this unique contention. To the contrary, the Third Circuit has concluded that a defendant has neither a due process right nor a right stemming from Fed.R.Civ.P. 43 to be absent from trial. *See United States v. Moore,* 466 F.2d 547, 548 (3d Cir.1972), *cert. denied,* 409 U.S. 1111, 93 S.Ct. 920, 34 L.Ed.2d 692 (1973). We need not decide, however, whether we agree with the Third Circuit because this record does not require us to do so. The district judge allowed Hamilton to be absent except for in-court identification by witnesses. Hamilton was required to be in the holding area of the courthouse to facilitate this. Because he was in the court building anyway, Hamilton decided to be present during the trial. Thus, he failed to preserve his claim to the alleged right for purposes of this appeal.

V

Hamilton next argues that the photographic display used in the investigation violated his due process rights. Due process, however, is not violated unless the photographic display results in a very substantial likelihood of irreparable misidentification in light of the totality of circumstances. *See United States v. Field,* 625 F.2d 862, 865-66 (9th Cir.1980). A suggestive photographic display "will not be held to violate due process if sufficient indicia of reliability are present." *United States v. Hanigan,* 681 F.2d 1127, 1133 (9th Cir.1982), *cert. denied,* 459 U.S. 1203, 103 S.Ct. 1189, 75 L.Ed.2d 435 (1983).

Hamilton contends that the photographic display was unduly suggestive because two of the six photographs used were of the same individual and two others were of individuals nearly identical in appearance. We have reviewed the photographs and agree with the district court that even if the display included photographs of only five individuals instead of six, it was not unduly suggestive. *See United States v. Bagley,* 772 F.2d 482, 493 (9th Cir.1985), *cert. denied,* 475 U.S. 1023, 106 S.Ct. 1215, 89 L.Ed.2d 326 (1986).

VI

Hamilton contends that parts of three jury instructions were prejudicial. He argues that certain phrases in the three instructions "urge [d] a unanimous verdict" and "presume[d] that the jury [would] return with a guilty verdict." Hamilton did not object to the three instructions, however, as required by Fed.R.Crim.P. 30. Therefore, we will reverse only if the allegedly prejudicial phrases constituted plain error. *See* Fed.R.Crim.P. 52(b). "Plain error exists only if it is highly probable that the error materially affected the verdict." *United States v. Williams,* 685 F.2d 319, 321 (9th Cir.1982). "[R]eversal for plain error is appropriate only when necessary to safeguard the integrity and reputation of the judicial process or to forestall a miscarriage of justice." *United States v. Lancellotti,* 761 F.2d 1363, 1367 (9th Cir.1985).

The jury instructions given by the district judge were the standard ones used in this type of case and, taken in context, they do not have an improper meaning. The jury was properly instructed that Hamilton was presumed innocent and that he should be acquitted if there was a reasonable doubt as to his guilt. Consequently, there was no error in the jury instructions.

VII

Hamilton contends that the district court erred in admitting certain items of evidence seized during the warrantless search of the motor home. We conclude that the evidence was properly admitted because agents Powers and Flanigan could in good faith reasonably rely on Cosbie's apparent authority to consent to the search of the motor home or, in the alternative, because the search of the motor home falls within the "vehicle exception" to the warrant clause.

***841** A.

Hamilton contends that the district court erred in concluding that agents Powers and Flanigan reasonably could have relied on Cosbie's apparent authority to consent to the search of the motor home. It is not clear whether we review a district court's finding of apparent authority to consent de novo or for clear error. In *United States v. Dubrofsky,* 581 F.2d 208 (9th Cir.1978) (*Dubrofsky*), the issue of voluntariness of the consent as well as authority to give the consent was before us. We reviewed the voluntariness issue pursuant to the clearly erroneous standard. *Id.* at 212; *see also LaDuke v. Nelson,* 762 F.2d 1318, 1321 (9th Cir.1985); *United States v. Caicedo-Guarnizo,* 723 F.2d 1420, 1423 (9th Cir.1984). It appears from

a reading of *Dubrofsky* that our court also applied the clear error test to the issue of authority to consent to the search. 581 F.2d at 212.

Subsequently, however, in *United States v. McConney,* 728 F.2d 1195 (9th Cir.) (en banc) (*McConney*), *cert. denied,* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984), we created a method of analysis in determining the standard of review:

> If application of the rule of law to the facts requires an inquiry that is "essentially factual,"-one that is founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct,"-the concerns of judicial administration will favor the district court, and the district court's determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

Id. at 1202 (citations omitted). It may be that the Supreme Court would treat the issue as essentially factual. In *Thompson v. Louisiana,* 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) (per curiam), the Court treated an argument raised by the State dealing with consent. The Louisiana Supreme Court attempted "to support its diminished expectation of privacy argument by reference to the daughter's 'apparent authority' over the premises when she originally permitted the police to enter." *Id.,* 105 S.Ct. at 412. Although the issue was not reached, the Court's response in dicta seems to show that the Court would review the issue as essentially factual: "Because the issue of consent is ordinarily a factual issue unsuitable for our consideration in the first instance, we express no opinion as to whether the search at issue here might be justified as consensual." *Id.*

It is unnecessary in this case, however, to decide whether the issue of apparent authority to consent is essentially factual and thus whether our standard of review should be de novo or for clear error. Under either standard, we would conclude that a valid consent was given.

The fourth amendment prohibits searches conducted without a warrant unless they fall within a " 'few specifically established and well-delineated exceptions.' " *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973) (*Schneckloth*), *quoting Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). One such exception is a search conducted pursuant to proper consent voluntarily given. *See United States v. Matlock,* 415 U.S. 164, 165-66, 94 S.Ct. 988, 990-91, 39 L.Ed.2d 242 (1974) (*Matlock*); *Schneckloth,* 412 U.S. at 219, 93 S.Ct. at 2043. Proof of voluntary consent, however, is not limited to proof that consent was given by the defendant. Valid consent to search can be "obtained from a third party who possessed common authority over or other sufficient relationship to the premises." *Matlock,* 415 U.S. at 171, 94 S.Ct. at 993.

We need not determine whether Cosbie actually possessed common authority over or other sufficient relationship to the motor home in order to affirm the district judge's ***842** denial of Hamilton's motion to suppress evidence. Rather, we must determine whether agents Powers and Flanigan "in good faith relie[d] on what reasonably, if mistakenly, appear[ed] to be [Cosbie's] authority to consent to the search." *United States v. Sledge,* 650 F.2d 1075, 1081 (9th Cir.1981).

Agents Powers and Flanigan found the motor home parked in the driveway of Cosbie's home with the door open. The motor home had been driven to her home by a grandson, was occupied by teenagers under Cosbie's apparent supervision, and was connected to her home by an electrical cord. Cosbie entered the motor home several times in the presence of the agents. Based on these facts, the district judge did not err in finding that the agents reasonably could have concluded that Cosbie had either common authority over or a sufficient relationship to the motor home to give consent. *See United States v. Miller,* 688 F.2d 652, 658 (9th Cir.1982) (son had sufficient access and control to consent to search of father's shop and surrounding area); *Dubrofsky,* 581 F.2d at 212 (party who has key and access throughout can consent to search); *United States v. Gulma,* 563 F.2d 386, 389 (9th Cir.1977) (possessor of motel key could consent to search even though he had never been to the room and stated that it was not his); *United States v. Murphy,* 506 F.2d 529, 530 (9th Cir.1974) (per curiam) (possessor of key to warehouse could give consent even though he had key only when performing work on the premises), *cert. denied,* 420 U.S. 996, 95 S.Ct. 1433, 43 L.Ed.2d 676 (1975).

Hamilton argues that the agents could not reasonably rely on Cosbie's authority to consent because she did not know who ultimately owned the motor home. We disagree. Knowledge of ultimate ownership is not a necessary prerequisite to a valid consent. The inability to declare who owns a home, an apartment, or a motor home, although a relevant

consideration, does not prevent government representatives from reasonably relying on an individual's apparent authority to consent so long as sufficient other facts exist to indicate common authority over or a sufficient relationship to the premises.

B.

Even if we were to conclude that the district court did err in finding that the agents reasonably could rely on Cosbie's apparent authority to consent, we still would affirm the district judge's denial of the motion to suppress. An additional exception to the warrant clause is the long-recognized "vehicle exception." *See Chambers v. Maroney,* 399 U.S. 42, 51-52, 90 S.Ct. 1975, 1981-82, 26 L.Ed.2d 419 (1970); *Carroll v. United States,* 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925) (*Carroll*). The vehicle exception has two principal justifications. First, automobiles or other vehicles can be moved quickly outside the jurisdiction of the magistrate from whom the warrant must be sought. *See South Dakota v. Opperman,* 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976) (*Opperman*); *Carroll,* 267 U.S. at 153, 45 S.Ct. at 285. Second, the expectation of privacy in one's vehicle is reduced by the pervasive regulations governing vehicles capable of traveling upon public roads. *See Opperman,* 428 U.S. at 367-68, 96 S.Ct. at 3096-97; *Cady v. Dombrowski,* 413 U.S. 433, 440-41, 93 S.Ct. 2523, 2527-28, 37 L.Ed.2d 706 (1973).

In *California v. Carney,* 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) (*Carney*), the Supreme Court held that under certain circumstances a motor home can fall within the vehicle exception because it evokes concerns similar to those surrounding automobiles and other readily-mobile highway vehicles. The Court emphasized that when a vehicle is readily capable of use on the highways "and is found stationary in a place not regularly used for residential purposes-temporary or otherwise-the two justifications come into play." *Id.,* 105 S.Ct. at 2070. The fact that a motor home might be used as a residence is not controlling. *Id.* at 2070-71. Thus, warrantless searches of motor homes are not unreasonable under the ***843** fourth amendment when based upon probable cause existing at the time of the search.

The Court recognized, however, that extending the vehicle exception to motor homes would not be appropriate under some circumstances. Consequently, the Court limited its decision by stating:

> We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

Id. at 2071 n. 3.

Carney involved the search of a motor home located in a public parking lot in downtown San Diego, California. This case requires us to consider the application of the vehicle exception when the motor home is located in a private residential driveway and is connected to the residence by an extension cord. Because there is no showing that the agents were on the premises illegally, we need not decide what, if any, limitations restrict a law enforcement officer's ability to enter onto privately-owned land to conduct a vehicle search. *See, e.g., United States v. Moscatiello,* 771 F.2d 589, 599-600 (1st Cir.1985); *United States v. Amuny,* 767 F.2d 1113, 1125-28 (5th Cir.1985).

We find that the search of the motor home falls within the scope of the vehicle exception. The mobility of the motor home is amply demonstrated by the fact that it was moved the night before the search was conducted. Although the registration had lapsed, the motor home was licensed with the State of California. Because it was located in a residential driveway, it had easy access to a public road. The fact that the motor home was attached to "utilities" in the broad sense is not very significant. A connection to electrical utilities by means of an extension cord is hardly the kind of "pipe and drain" connection that would render the motor home more permanent and less mobile as was contemplated by the Court in *Carney.*

Hamilton does not contend that the police lacked probable cause to arrest him. His connection with the robberies with which he was charged was well-established and would have supported a warrant to search his residence for evidence of the crimes. Similarly, when the agents learned of articles of clothing being removed from the residence and placed in the motor home, probable cause existed to search the motor home as well. Therefore, we conclude that the articles of clothing seized during the warrantless search of the motor home could have been properly admitted under the vehicle exception.

AFFIRMED.

HUG, Circuit Judge, concurring in part and dissenting in part.
I concur in parts I-VI of the majority opinion, and in part VII for the reason expressed in sub-part A. I find it unnecessary to reach the issues in sub-part B.

Were it necessary to reach those issues, I would dissent, on the ground that this is an unwarranted extension of the "vehicle exception." I see a significant difference in the expectancy of privacy in a motor home located in a public parking lot, such as involved in *California v. Carney,* ---U.S. ----, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), and a motor home located in a private driveway under the circumstances involved in this case. Here the motor home was connected with the utilities in the residence. The persons utilizing the motor home were not persons who would be driving the vehicle away before a warrant could be obtained, but teenagers under the supervision of the resident of the house. The location and use being made of this vehicle was much more akin to a functional part of a private residence than to a motor vehicle on the highway, where the vehicle exception is meant to apply.

***844** CYNTHIA HOLCOMB HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in all but Part VII A of the majority opinion. I cannot join in that portion of the opinion because I believe that under the facts of this case the police could not have reasonably believed that Claudia Cosbie had authority to consent to the warrentless search of the motor home.

I

As an initial matter, I disagree with the majority opinion's implication that the issue of whether Cosbie had sufficient authority under the fourth amendment to consent to a search of a motor home should be reviewed under the clearly erroneous standard. In my view, the question of whether Cosbie's consent, freely and voluntarily given, was binding on Hamilton for the purposes of the fourth amendment "requires us to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests." *United States v. McConney,* 728 F.2d 1195, 1205 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). It is a question not altogether different from the questions of exigent circumstances and probable cause, questions which this court has already decided warrant de novo review. *Id.* at 1200 n. 4, 1204-05.

In *Frazier v. Cupp,* 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), the police asked the defendant's cousin during the cousin's arrest where they could find the cousin's clothing. The cousin then pointed the police to a duffel bag located within his home. The court concluded that because the cousin had at least joint use of the bag, the police's search of the bag was proper and that belongings of the defendant seized incident to the lawful search were properly admitted. *Id.* at 740, 89 S.Ct. at 1425. The Court's decision is best understood as holding that the cousin had authority to consent to a search of the bag as far as his own belongings were concerned and that, this consent being valid, the clothing of the defendant also seized during the lawful search could also be admitted.

While this decision relied upon certain factual findings dealing with the use of the bag, it also made judgments about property of others seized incident to a lawful search. These questions involve a mix of fact and law. The fact that these questions involve the "exercise [of] judgment about the values that animate legal principles" is born out by the Court's discussion. *McConney,* 728 F.2d at 1202. The defendant claimed that he had given his cousin the use of only certain compartments within the bag. While this *fact* deals with the extent of mutual use, the Court concluded that it was *legally irrelevant* stating:

> Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. *We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent.*

Frazier, 394 U.S. at 740, 89 S.Ct. at 1425 (emphasis added). The Court noted further that the defendant "*must be taken to have assumed the risk* that Rawls would allow someone else to look inside." *Id.* (emphasis added).

United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) provides an even stronger example of the inherently legal nature of the consent issue. The Court stated that the appropriate inquiry in these consent cases requires a finding that the third party "possessed common authority over *or other sufficient relationship* to the premises or effects sought to be inspected." *Matlock,* 415 U.S. at 171, 94 S.Ct. at 993 (emphasis added). While a trial court may be in the best position to determine the actual extent of mutual use, the question of whether these facts constitute a "sufficient

relationship" for the purposes of the fourth amendment is an inherently legal one.

These cases, coupled with the teachings of *McConney,* lead me to the conclusion that de novo review is appropriate on the ***845** consent issue presented here. Because we have expressly reserved this question, Cosbie's consent is sufficient to support the district court's decision to admit the articles of clothing only if we would reach the same conclusion as the district court after a de novo review of the record.[1]

II

Under a de novo standard of review, I cannot agree with the majority that the agents could reasonably believe that Cosbie had authority to consent to the search.

In *United States v. Dubrofsky,* 581 F.2d 208 (9th Cir.1978), we held that "[a] party who has a key to the premises and access throughout the residence can also give a valid consent to search." *Id.* at 212. I would concede that, absent an express statement to the contrary, actions consistent with ownership or consensual mutual use of the property are sufficient to justify an officer's good faith belief that the third party had authority to consent to a search of the premises. Likewise in *Matlock,* mutual use of the premises without indications to the contrary was also sufficient to support a search.

Suppose, however, that in *Dubrofsky* the person having the key to the premises had told the law enforcement officers "I have the key, but I do not own the house and I am only supposed to go inside to feed the dog." I do not think that in this case the police would be justified in having a good faith belief that the person had authority to consent to the search of the premises. Further, the owner of the house would not have "assumed the risk" that law enforcement officers would be admitted.

This case falls in between *Dubrofsky* and the hypothetical posited above. In my opinion, it falls closer to the latter. The actions taken by Cosbie, taken alone, would justify a conclusion that she had mutual use of the property and authority to admit the officers.[2] Every action she took was consistent with this mutual use, and the conclusion of the FBI officers that she had authority to consent would have been justified.

The conclusion was not reasonable after Cosbie made an express disclaimer of ownership and after she indicated that she did not know who owned the motor home. The statement called into question her authority to consent based upon mutual use of the property. Cosbie may have had access to the motor home only for narrow and limited purposes, like, for example, moving the motor home so that she could move her vehicle through the driveway. At the very least, the officers should have inquired further about the extent of her access to the motor home.

Further, agents Powers and Flanigan contacted their office before approaching Cosbie at the Van Ness address. They were informed at that time that motor vehicle records showed Frank Crawford as the owner of the motor home, not either Hamilton or Cosbie. The agents made no effort to contact him or to garner his consent to a search of the vehicle. Powers and Flanigan could not have been surprised when Cosbie stated that she did not know who owned the motor home nor could they have been deceived by Cosbie's statement that she thought the motor home belonged to Hamilton. The agents knew otherwise. In fact, after their conversation with Cosbie, the agents could only have been left with the impression that Cosbie knew little or nothing at all about where the motor home had come from or to whom it belonged. Given how little Cosbie knew, the agents could not have reasonably believed that Cosbie had authority to consent to a search of the vehicle.

***846** Although I do not agree with Part VII A of the majority opinion, nonetheless I would affirm the conviction in this case for the reasons set forth in Part VII B of the majority opinion.

All Citations

792 F.2d 837, 55 USLW 2042

Footnotes

1 *Thompson v. Louisiana,* 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) does not compel a different conclusion. In *Thompson,* the police testified that they received no consent to search. The Court noted that any finding of consent in that case would have to be gauged by the standards articulated in *Matlock.*

2 As the majority opinion notes, Cosbie entered and exited the motor home several times in the presence of the agents.

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881 F.2d 1551
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of
America, Plaintiff–Appellee,
v.
Alirio HASTAMORIR, Hernan Lopez,
Antonio Ledezma, Defendants–Appellants.

No. 87–6100.
|
Sept. 1, 1989.

Synopsis
Defendants were convicted in the United States District Court for the Southern District of Florida, No. 87–00234 Cr-EBD, Edward B. Davis, J., of narcotics offenses and they appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) evidence sustained conviction; (2) there was probable cause for arrest; and (3) instruction on constructive possession was proper.

Affirmed.

Attorneys and Law Firms

***1553** Milton E. Grusmark, North Miami, Fla., for Alirio Hastamorir.

Neil M. Nameroff, Miami, Fla., for Hernan Lopez.

Jerris Leonard, Washington, D.C., for Antonio Ledezma.

Linda Collins Hertz, Mayra Reyler Lichter, Sharon Kegerreis, Asst. U.S. Attys., Miami, Fla., for the U.S.

Appeal from the United States District Court For the Southern District of Florida.

Before FAY and HATCHETT, Circuit Judges, and HOFFMAN[*], District Judge.

Opinion

HATCHETT, Circuit Judge.

In this multi-appellant cocaine conspiracy case, we reject numerous claims of error and affirm the district court's convictions and judgments.

FACTS

On April 8, 1987, United States Customs Service agents observed Alirio Hastamorir, Hernan Lopez, Antonio Ledezma; Clemente Vila, Guillermo Ramirez and Telmo Viloria conversing at the TGI Friday's (TGIF) restaurant, Aventura Mall, North Miami Beach, Florida. At approximately 6 p.m., Lopez, Vila, and Ramirez left TGIF. Lopez and Ramirez walked through the mall parking lot to a Chevrolet Celebrity station wagon and opened the rear hatch. Vila walked to a Nissan Sentra parked beside the station wagon and removed two heavy cardboard boxes from the trunk of the Sentra. He gave the cardboard boxes to Ramirez. Lopez and Ramirez removed brick-like packages from the cardboard boxes and placed them in a compartment beneath the floorboards in the cargo area of the station wagon.

After watching the transfer of the boxes, four Customs agents approached Lopez, Vila and Ramirez. Special Agent Woodrow Kirk asked Vila in Spanish and in English whether he had any involvement with the Celebrity station wagon or its cargo. Vila denied any knowledge of the station wagon or its cargo, but admitted ownership of the Sentra. Lopez and Ramirez also denied any knowledge of the station wagon or its cargo.

From an unopened box and the compartment in the cargo area of the station wagon, the agents seized approximately thirty kilogram-size packages of cocaine. Each kilogram package bore the marking "CEBU" on the outside wrapping. While searching the Sentra, the agents found two more kilograms of cocaine marked with the word "MOTORES," a firearm, and several documents. The agents arrested all three men. After waiving the right to remain silent, Lopez claimed that he arrived at the mall in a Cadillac Cimarron, that he knew Ramirez from Colombia, but that he could ***1554** not remember how he had met Ramirez. Lopez also denied meeting anyone inside TGIF and claimed that he did not know Vila. Vila also waived the right to remain silent and reaffirmed his lack of knowledge concerning the two boxes discovered in the station wagon. Vila denied knowing Ramirez and Lopez. Ramirez declined to waive his constitutional rights.

Following these arrests and the seizure of the cocaine, Customs agents continued their surveillance of the Aventura Mall. At approximately 7:15 p.m., the agents observed Hastamorir, Ledezma, and Viloria leave TGIF's and get into a yellow Datsun 240Z. Ledezma sat in the driver's seat, Viloria in the passenger seat, and Hastamorir in the hatch area. Special Agents Kirk and Sauvage approached the Datsun in their automobile. After parking their automobile facing the Datsun, Agent Kirk approached the Datsun with his identification folder in one hand and his weapon in the other hand. He ordered Ledezma to stop the automobile. The automobile moved approximately eight feet and then stopped approximately seven feet from Agent Kirk. The agents immediately removed the three men from the automobile and handcuffed them. During this process, Agent Sauvage observed Hastamorir drop a piece of paper to the ground and kick it under the Datsun. The piece of paper contained, among other notations, the words "CEBU" and "MOTORES," a series of names, and telephone numbers for beepers.[1] The agents placed Hastamorir, Ledezma, and Viloria under arrest and advised them of their rights.

Even though they declined to waive their rights, Ledezma and Viloria inquired about the reasons for their arrest. A Customs agent explained that Lopez, Vila and Ramirez, the three men they had met at TGIF, had been arrested for narcotics violations. Upon hearing of the arrests, Ledezma and Viloria spontaneously announced that they did not know any of the men who had been arrested. They claimed they had just met Hastamorir who asked them for a ride to a section of Miami. Ledezma told Agent Kirk that he was with no one except Hastamorir and Viloria while at TGIF.

Hastamorir waived his constitutional rights and stated that he had arrived at the bar with Ledezma and Viloria, both of whom he had met that day, and had met no one else in the bar. Hastamorir admitted that he had dropped the piece of paper because he was worried about its discovery.

PROCEDURAL HISTORY

On April 16, 1987, a federal grand jury returned a four-count indictment charging Hastamorir, Lopez, Ledezma, Vila, Ramirez, and Viloria with conspiracy to possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count I), and possession with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count II).[2]

***1555** A United States Magistrate held suppression hearings and recommended that the district court deny all motions to suppress evidence. The district court denied the motions to suppress.

On September 29, 1987, Hastamorir, Lopez, and Ledezma appeared before the district court for trial. Ledezma moved to exclude fingerprint evidence. The district court denied Ledezma's motion and commenced trial, after assuring that Ledezma would have the opportunity to conduct an independent examination of the evidence. The district court, however, granted Ledezma's motion for a severance midway through trial. Hastamorir and Lopez proceeded to trial and on September 30, 1987, the jury convicted them on Counts I and II of the indictment. Neither Hastamorir nor Lopez testified at trial.

On October 5, 1987, Ledezma's trial began. On October 6, 1987, the jury returned verdicts of guilty on Counts I and II of the indictment, but acquitted Ledezma on Count IV. The verdict form included the explanation, "constructive possession," which was written beside the verdict of guilty on Count II.

The district court sentenced Hastamorir, Lopez, and Ledezma to five years imprisonment for Count I and ten years for Count II, to run concurrently, followed by a five-year term of supervised release.

CONTENTIONS

Hastamorir contends that probable cause did not exist for his arrest and that the evidence is not sufficient to support his convictions.

Lopez contends that the search of the Celebrity station wagon was not supported by probable cause, that he did not abandon the automobile, and that he had standing to challenge the search.

Ledezma contends that insufficient evidence exists to support his convictions. He also contends that the district court erred in allowing the government to introduce evidence of latent fingerprints; erred in allowing the government to introduce statements he made which were not disclosed to him prior

to trial; erred in failing to establish in the record whether the agents properly read to him his constitutional rights; erred in failing to compel the government to comply with the *Brady* rule[3] and divulge the identity of a confidential informant; erred in failing to instruct the jury on an entrapment defense; erred in defining "constructive possession" in the jury instruction; and erred in the manner in which it conducted a first jury poll and in its refusal to conduct a second jury poll upon request.

We address all of the above contentions.

DISCUSSION

Probable Cause for Hastamorir's Arrest

The district court determined that the discovery of the drug ledger in the vicinity of Hastamorir's feet established probable cause for his arrest. The district court also found that Hastamorir's handcuffing was a reasonable precautionary action designed to provide for the agents' safety. We must independently apply legal principles to the district court's findings of fact, unless those findings are clearly erroneous. *United States v. Roy,* 869 F.2d 1427, 1429 (11th Cir.1989); *Adams v. Balkcom,* 688 F.2d 734, 739 (11th Cir.1982). Absent clear error, we are bound by the district court's findings of fact at the suppression hearing. *United States v. Roy,* 869 F.2d at 1429; *United States v. Newbern,* 731 F.2d 744, 747 (11th Cir.1984).

Hastamorir argues that the facts of this case do not establish probable cause for his arrest because the only relevant fact known to the agents at the time of his arrest was that he had been in TGIF with five other men. He asserts that the ledger may not be considered because he dropped the ledger after his arrest, not before it. Hastamorir cites *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), *Henry v. United States,* 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959), and *United States v. Rias,* 524 F.2d 118 (5th Cir.1975), to argue ***1556** that the armed stop of the automobile and his handcuffing constituted an arrest.

The government argues that under the totality of the circumstances, the customs officers had reasonable suspicion to make an investigatory stop and detain Hastamorir and the other passengers in the car.

We must determine "when" Hastamorir's arrest occurred. In determining "when" a person is arrested, we ask at what point, "in view of all the circumstances surrounding the incident, a reasonable person would have believed he [she] was not free to leave." *United States v. Hammock,* 860 F.2d 390, 393 (11th Cir.1988). Circumstances which indicate an arrest include: the blocking of an individual's path or the impeding of his progress; the display of weapons; the number of officers present and their demeanor; the length of the detention; and the extent to which the officers physically restrained the individual. This list is not exclusive. *United States v. Hammock,* at 393.

We have identified three categories of police-citizen encounters which invoke the fourth amendment: police-citizen communications involving no coercion or detention; brief seizures or investigative detentions; and full-scale arrests. *United States v. Espinosa–Guerra,* 805 F.2d 1502, 1506 (11th Cir.1986); *United States v. Berry,* 670 F.2d 583, 591 (5th Cir. Unit B 1982) (in banc). The first category of police-citizen encounters fails to implicate fourth amendment scrutiny. The second category, investigative detentions, involves reasonably brief encounters in which a reasonable person would have believed that he or she was not free to leave. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (Supreme Court carved out a narrow exception to the probable cause requirement, allowing police to detain a suspect based upon reasonable suspicion for the purpose of an investigative detention). In order to justify a fourth amendment seizure, the government must show a reasonable and articulable suspicion that the person has committed or is about to commit a crime. Finally, if the totality of circumstances indicates that an encounter has become too intrusive to be classified as an investigative detention, the encounter is a full-scale arrest, and the government must establish that the arrest is supported by probable cause. *United States v. Espinosa–Guerra,* 805 F.2d at 1506.

The district court's denial of the suppression motion may be reversed only if the court erred in finding probable cause to arrest, given all the facts and circumstances within the collective knowledge of the law enforcement officers. *United States v. Jimenez,* 780 F.2d 975, 978 (11th Cir.1986). In determining "when" an investigative stop ripens into an arrest, no bright-line rule exists. Instead, in determining whether an investigative detention is unreasonable, "common sense and ordinary human experience must govern over rigid criteria." *United States v. Espinosa–Guerra,* 805 F.2d at 1509 (quoting *United States v. Sharpe,* 470 U.S. 675, 685, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985)). We have identified two considerations that circumscribe the limits of a seizure:

first, a balancing test weighing the government's interest involved against the intrusion on the individual; and second, consideration of whether the scope of the search is strictly tied to and justified by the circumstances which rendered its initiation permissible. *United States v. Elsoffer,* 671 F.2d 1294 (11th Cir.1982); *United States v. Berry,* 670 F.2d at 601–02; *United States v. Espinosa–Guerra,* 805 F.2d at 1509.

In *United States v. Kapperman,* 764 F.2d 786 (11th Cir.1985), we noted that

> neither handcuffing nor other restraints will *automatically* convert a *Terry* stop into a de facto arrest requiring probable cause. Just as probable cause to arrest will not justify using excessive force to detain a suspect, the use of a particular method to restrain a person's freedom of movement does not necessarily make police action tantamount to an arrest. The inquiry in either context is reasonableness. [Citations omitted] [emphasis in original].

United States v. Kapperman, at 790 n. 4. We also noted that police may take reasonable action, based upon the circumstances, to protect themselves during investigative detentions. ***1557** *United States v. Kapperman,* at 790 n. 4. *See United States v. Roper,* 702 F.2d 984, 988 (11th Cir.1983) (officer drawing his gun and directing two passengers exit vehicle not unreasonable).

The handcuffing of Hastamorir constituted a *Terry* stop, and was a reasonable action designed to provide for the safety of the agents. When the agents extracted Hastamorir, Ledezma, and Viloria from the Datsun, the agents reasonably believed that the men presented a potential threat to their safety. Agent Kirk's action of drawing his weapon and Hastamorir's handcuffing were reasonable. *See United States v. Kapperman,* 764 F.2d at 790 n. 4 (handcuffing does not automatically convert an investigative detention into an arrest and police may take reasonable action to protect themselves during investigative detentions); and *United States v. Roper,* 702 F.2d at 988 (officer's drawing of his weapon not unreasonable under circumstances).

The district court determined that the agents had probable cause to arrest Hastamorir after they discovered the drug ledger. We agree. "Probable cause exists where the facts and circumstances within the collective knowledge of the law enforcement officials, of which they had reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe an offense has been or is being committed." *United States v. Jimenez,* 780 F.2d at 978. Further, we determine the existence of probable cause based on objective standards and the totality of the circumstances. *United States v. Roy,* 869 F.2d at 1433; *Maryland v. Macon,* 472 U.S. 463, 470–71, 105 S.Ct. 2778, 2782, 86 L.Ed.2d 370 (1985). After discovering the drug ledger on the ground and observing Hastamorir's attempts to conceal or destroy it, the agents had probable cause to arrest him. We so hold.

Sufficiency of the Evidence

Hastamorir and Ledezma challenge the sufficiency of the evidence used to convict them of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. Hastamorir contends that his conviction is improper because the only evidence against him consists of the following: he was seated at a bar with five other men whose conversations were not in evidence; after his arrest, a sheet of paper was found at his feet which contained words also seen on kilos of cocaine associated with other men at the bar and in an automobile with which he had no connection. Hastamorir cites *United States v. Sullivan,* 763 F.2d 1215 (11th Cir.1985) to argue that mere presence, even with knowledge, is not sufficient to prove a charge of conspiracy, and that proof must exist of an intention to engage in the specific conspiracy. Likewise, *United States v. Bain,* 736 F.2d 1480 (11th Cir.), *cert. denied,* 469 U.S. 937, 105 S.Ct. 340, 83 L.Ed.2d 275 (1984) supports the argument that close association with a co-conspirator or mere presence at the scene of the crime is insufficient evidence to show participation in a conspiracy.

The government emphasizes that it produced evidence to prove that Hastamorir knew the significance of the drug ledger linking him to the cocaine because he attempted to hide it and admitted that he was worried about it. We agree.

Ledezma asserts that his presence at TGIF in Aventura Mall, where he frequently meets with friends, can reasonably be viewed as an unsuspicious and legal activity. He asserts that the discovery of his fingerprints on the outside of two kilogram packages of cocaine in no way demonstrates that he knew what was inside the packages or that he had any intent to commit an illegal act.

The government points out that Ledezma's false testimony that he was not with any co-conspirators at TGIF entitled the jury to reasonably infer that he was aware of and participated in criminal activity at the mall. We agree.

As to the requirement that it prove dominion and control, the government asserts that it did so by proving Hastamorir's

knowledgeable possession of the drug ledger and the fingerprint evidence showing that Ledezma had touched the kilogram packages.

***1558** Substantial evidence supports the finding that a conspiracy existed between Hastamorir, Lopez, Ledezma, Vila, Ramirez and Viloria. Substantial evidence also supports the finding that Hastamorir and Ledezma knowingly possessed the cocaine with the intent to distribute it.

The jury's verdict must be sustained if there is substantial evidence, taken in a light most favorable to the government, to support it. *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). In reviewing the evidence in a light most favorable to the government, we hold that the jury's verdicts finding both Hastamorir and Ledezma guilty of conspiracy to possess with intent to distribute an unlawful amount of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 and possession with intent to distribute an unlawful amount of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. § 2 are amply supported.

Ledezma's Fingerprints and Arrest

Ledezma contends that the district court erred in allowing the government to introduce evidence and testimony in violation of Fed.R.Crim.P. 16 and the discovery order. Ledezma asserts that the government violated Fed.R.Crim.P. 16 and the discovery order by: (1) failing to disclose oral statements he made at the time he was arrested that were used against him at trial; (2) by withholding *Brady* material, including his statements; (3) by using a confidential informant; and (4) by failing to timely disclose the existence of his latent fingerprints.[4]

Ledezma argues that the latent fingerprint evidence was introduced in violation of the standing discovery order. A fingerprint specialist in the Drug Enforcement Administration (DEA) Laboratory, lifted twenty latent fingerprints from the 30 kilograms of cocaine seized from the station wagon and identified two of these fingerprints as those of Ledezma. The government became aware of Ledezma's latent fingerprints on September 14, 1987, but failed to disclose this evidence to Ledezma's counsel until Friday, September 25, 1987, only four days before Ledezma's trial. Ledezma argues that the late receipt of this information prevented him from obtaining either witnesses or extrinsic evidence to establish that he acted in a non-criminal manner when his fingerprints were placed on the packages. Ledezma asserts that the government was obligated to notify him when it obtained the latent fingerprint evidence to be in compliance with Fed.R.Crim.P. 16(c), and because the trial was scheduled to start two weeks later.

Ledezma also argues that the district court erred in allowing the government to introduce statements he made incident to his arrest. He argues that the government violated the standing discovery order by failing to disclose these statements prior to trial. Ledezma cites *United States v. Rodriguez,* 799 F.2d 649 (11th Cir.1986) and *United States v. Noe,* 821 F.2d 604, 607 (11th Cir.1987) to argue that the government was obligated to divulge his statements pursuant to the standing discovery order and failed to do so.

The government asserts that it informed Ledezma's counsel in its initial discovery response that it would provide the results of fingerprint analyses as soon as they became available.

The government contends that Ledezma's counsel was notified prior to trial that Ledezma had made certain spontaneous statements to the agents at the time of his arrest. The government asserts that although Ledezma was on notice of these exculpatory statements, he took the stand in his own defense and testified that he told the customs agents that he met a doctor who is a friend of his at TGIF on the day of the arrest. Consequently, it was proper to impeach Ledezma on his prior inconsistent ***1559** statements and introduce rebuttal testimony to attack his credibility.

We review cases dealing with discovery violations under Fed.R.Crim.P. 16 using an abuse of discretion standard. *United States v. Burkhalter,* 735 F.2d 1327, 1329 (11th Cir.1984). We hold that the district court did not abuse its discretion in allowing the introduction of Ledezma's fingerprints and prior inconsistent statements.

Jury Instruction on Constructive Possession

Ledezma contends that the district court improperly defined constructive possession in its jury instruction.[5] Citing *United States v. Brunty,* 701 F.2d 1375, 1382 (11th Cir.), *cert. denied,* 464 U.S. 848, 104 S.Ct. 155, 78 L.Ed.2d 143 (1983) and *United States v. Bain,* 736 F.2d 1480, 1486–87 (11th Cir.), *cert. denied,* 469 U.S. 937, 105 S.Ct. 340, 83 L.Ed.2d 275 (1984), Ledezma argues that the district court's instruction was erroneous because the court failed to inform the jury that "constructive possession" means having "dominion and control." Ledezma contends that the district court's error led

to confusion among the jury members and uncertainty in their verdict.

Because Ledezma did not object to the court's instructions either before or after they were given to the jury, and presented no request for additional instructions on these issues, we evaluate the charge under the plain error standard viewing the charge in its entirety and in its context to the entire trial. *United States v. Fuentes–Coba,* 738 F.2d 1191, 1196 (11th Cir.1984); *United States v. Park,* 421 U.S. 658, 674–75, 95 S.Ct. 1903, 1912–13, 44 L.Ed.2d 489 (1975). Ledezma's conviction will be set aside only where the charge is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or where it seriously affects the fairness, integrity or public reputation of a judicial proceedings. *United States v. Fuentes–Coba,* 738 F.2d at 1196; *United States v. Thevis,* 665 F.2d 616, 645 (5th Cir. Unit B), *cert. denied,* 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).

In reviewing the district court's instructions to the jury, we find that they are not erroneous. The district court's instructions were not likely to result in a grave miscarriage of justice, nor seriously affects the fairness, integrity or public reputation of a judicial proceeding.

Lopez's Motion to Suppress

The district court determined that Lopez foreclosed any claim of standing to challenge the search of the Celebrity station wagon because his disclaimers ended any legitimate expectation of privacy. The district court also determined that Lopez abandoned his fourth amendment rights, even though a weapon may have been drawn during the period of his detention. To determine whether an individual has standing to challenge a search, we proceed directly to the issue of whether the individual maintains a legitimate expectation of privacy in the object of the search. *United States v. Hawkins,* 681 F.2d 1343, 1344 (11th Cir.), *cert. denied,* 459 U.S. 994, 103 S.Ct. 354, 74 L.Ed.2d 391 (1982) ("After *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the proper analysis proceeds directly to the substance of a defendant's Fourth Amendment claim to determine whether the defendant had a reasonable and legitimate expectation of privacy in the article at the time of the search and consequently, whether the Fourth Amendment has been violated."). Determining whether an individual has a legitimate expectation of privacy in the object of a search requires a two-part inquiry. *See United States v. McKennon,* 814 F.2d 1539, 1542–43 (11th Cir.1987). The first question asks whether the individual has manifested "a subjective expectation of privacy in the object of the challenged search." *United States v. McKennon,* 814 F.2d at 1543. "[This inquiry] is a factual determination which is generally reviewed under a clearly erroneous standard." *United States v. McKennon,* 814 F.2d at 1543 (citations omitted). The second inquiry is whether society is willing to recognize the individual's expectation of privacy as legitimate. This is a legal question which we review plenarily. *United States v. McKennon,* 814 F.2d at 1543. If we dispose of the standing question based on the first inquiry, we need not reach the second. *United States v. McBean,* 861 F.2d 1570, 1573 n. 7 (11th Cir.1988). Abandonment and the first level of fourth amendment standing are factual issues, and the district court's decision is subject to review under a clearly erroneous standard. *See United States v. McKennon,* 814 F.2d at 1543, 1545–46. We must independently apply legal principles to the district court's findings of fact, unless those findings are clearly erroneous. *United States v. Roy,* 869 F.2d at 1429; *Adams v. Balkcom,* 688 F.2d at 739. Absent clear error, we are bound by the district court's findings of fact at the suppression hearing. *United States v. Roy,* 869 F.2d at 1429; *United States v. Newbern,* 731 F.2d at 747.

Lopez argues that the search was not supported by probable cause, that the station wagon was not abandoned, and that he has standing to challenge the station wagon search because Ramirez gave him permission to use it. Moreover, he argues that the agents' questions concerning his ownership of the automobile were inappropriate, because he had standing based on rights other than ownership.

Citing *United States v. McKennon,* 814 F.2d at 1546, Lopez asserts that abandonment is a question of intent which can be inferred from words, acts, and other objective facts. He argues that the district court failed to consider the impact of the drawn firearm on his ability to freely and voluntarily abandon his expectation of privacy. Further, Lopez asserts that the agent used the incorrect Spanish verb, "conocer," which means to know a person, instead of "saber," which means to know a thing, when inquiring about the station wagon. Consequently, he did not understand Agent Kirk's Spanish, and honestly answered that he was not the owner of the automobile.

The government argues that the district court properly denied Lopez's motion to suppress evidence seized from the station wagon when it found that Lopez had abandoned any fourth amendment expectation of privacy in the automobile. The government emphasizes that Lopez repeatedly disclaimed any knowledge of or interest in the vehicle and the boxes. The government cites *United States v. McKennon,* 814 F.2d 1539

(11th Cir.1987) and *United States v. Hawkins,* 681 F.2d 1343, 1345 (11th Cir.), *cert. denied,* 459 U.S. 994, 103 S.Ct. 354, 74 L.Ed.2d 391 (1982) in support of the position that disclaimer of ownership or knowledge of property ends any reasonable expectation of privacy and precludes a subsequent fourth amendment claim.

We are not convinced that the district court's finding that Lopez abandoned any standing to challenge the search of the Celebrity station wagon is clearly erroneous. We hold that Lopez did not express a subjective expectation of privacy in the Celebrity station wagon nor its contents, and effectively abandoned any fourth amendment rights he possessed in the station wagon and its contents.

Jury Poll

Ledezma contends that the district court erred in the manner in which it conducted its first jury poll and by its refusal to conduct a second jury poll upon his request. Ledezma asserts that the record merely indicates that the jury was polled. Ledezma cites *Cook v. United States,* 379 F.2d 966 (5th Cir.1967) to argue that when the first poll showed uncertainty, the district court should have removed the uncertainty so the jury's intent could be clearly understood. The government contends ***1561** that the district court properly declined to poll the jury a second time.

The form of jury polling is a matter entrusted to the sound discretion of the trial judge. *United States v. O'Bryant,* 775 F.2d 1528 (11th Cir.1985). Absent an expression of uncertainty as to the verdict by one or more of the jurors, no abuse of discretion is committed by refusing to poll the jury a second time. *United States v. O'Bryant* at 1536. We hold that the district court did not abuse its discretion in conducting its first jury poll, nor did it abuse its discretion by refusing to conduct a second jury poll.

Accordingly, the district court's convictions and judgments are affirmed.[6]

AFFIRMED

All Citations

881 F.2d 1551

Footnotes

* Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

1 Agent Kirk, qualified as an expert at trial, testified that this document was a drug ledger.

2 Title 21 U.S.C. § 841(a)(1) provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess within intent to manufacture, distribute, or dispense a controlled substance[.]
>
> Title 21 U.S.C. § 846 provides:
>
> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
>
> Title 18 U.S.C. § 2 provides:
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The grand jury charged Vila with knowingly carrying a firearm during the commission of a drug trafficking crime, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 924(c) (Count III), however, Vila is not a party to this appeal. The grand jury

additionally charged Ledezma with an intentional assault upon a federal agent engaged in the performance of official duties, in violation of 18 U.S.C. §§ 111 and 1114 (Count IV), however, Ledezma was acquitted of this charge.

3 *See Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

4 Fed.R.Crim.P. 16(c) provides:

> (c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

Ledezma fails to enumerate the government's rule 16 violations, except in a passing reference to Fed.R.Crim.P. 16(g) [sic] [16(c)].

5 The district court instructed the jury:

> The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession.
>
> A person who has direct physical control of something on or around his person is then in actual possession of it.
>
> A person who is not in actual possession, but who has both the power and the intention to later take control over something either alone or together with someone else, is in constructive possession of it.
>
> If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.
>
> When the word possession has been used in these instructions, it includes actual as well as constructive possession, and also sole as well as joint possession.

6 Appellants have adopted each other's claims of error. Those claims are rejected.

All pending motions are denied.

195 F.3d 258
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

John Jay HILL and Malcolm Scott Hill, Defendants–Appellants.

No. 98–6047.
|
Argued Aug. 11, 1999.
|
Decided Oct. 4, 1999.

Synopsis
Defendants were convicted pursuant to conditional guilty pleas in the United States District Court for the Western District of Tennessee, Julia S. Gibbons, Chief District Judge, of possession with intent to distribute cocaine. Defendant appealed denial of their motion to suppress evidence seized from their rental truck pursuant to traffic stop. The Court of Appeals, Clay, Circuit Judge, held that: (1) officer had probable cause to make initial traffic stop; (2) traffic stop did not exceed its original scope; (3) officer had reasonable suspicion to detain defendants beyond scope of stop so as to allow drug detection dog to conduct sniff search; and (4) evidence supported finding that drug detection dog was properly trained and reliable.

Affirmed.

Boggs, Circuit Judge, concurred in result only.

Attorneys and Law Firms

***261** Paul M. O'Brien (argued and briefed), Asst. U.S. Attorney, Memphis, TN, for Plaintiff–Appellee.

W. Thomas Dillard (briefed), Richard L. Gaines (argued), Ritchie, Fels & Dillard, Knoxville, TN, for Defendants–Appellants.

Before: KRUPANSKY, BOGGS, and CLAY, Circuit Judges.

CLAY, J., delivered the opinion of the court, in which KRUPANSKY, J., joined. BOGGS, J., concurred in the result only.

OPINION

CLAY, Circuit Judge.

Defendants, John J. Hill and Malcolm Scott Hill, appeal from the judgment of conviction entered by the United States District Court for the Western District of Tennessee, following Defendants' conditional guilty plea to one count of possession with intent to distribute cocaine, in violation of 18 U.S.C. § 841(a)(1), wherein Defendants reserved the right under Federal Rule of Criminal Procedure 11(a)(2) to appeal the district court's order denying their motion to suppress the evidence seized from Defendants' U–Haul Rental Truck on February 23, 1996, pursuant to a traffic stop. For the reasons set forth below, the district court's order denying Defendants' motion to suppress is AFFIRMED.

BACKGROUND

On the evening of February 23, 1996, Deputy Steve Whitlock of the Shelby County, Tennessee, Sheriff's Department Interstate Interdiction Unit was on routine patrol on I–40 in Shelby County. Deputy Whitlock had his patrol car positioned where I–40 and I–240 merge, when he noticed a 1996 Ford U–Haul traveling eastbound on I–40 while in the process of navigating a large curve in the interstate. According to Deputy Whitlock, the U–Haul was not speeding at the time. Nonetheless, Deputy Whitlock pulled out behind the U–Haul after it made the turn, to determine whether the driver of the U–Haul engaged in a traffic violation because, as an experienced interdiction officer, Deputy Whitlock was aware that U–Haul trucks were often used to used to transport narcotics. In Deputy Whitlock's words, he pulled out after the vehicle because it was a U–Haul, and because it had been his experience that U–Hauls carry narcotics.

Traveling in his patrol car, Deputy Whitlock then caught up to the U–Haul which was now traveling northbound on I–40. Deputy Whitlock paced himself behind the U–Haul by traveling four to five car lengths behind it for about three-fourths of a mile. When the speed of Deputy Whitlock's vehicle and the speed of the U–Haul were the same, Deputy

Whitlock checked his certified speedometer, which showed a reading of sixty-two miles per hour. Although Deputy Whitlock's vehicle was equipped with radar, he was unable to clock the speed of the U–Haul using the radar equipment inasmuch as the two vehicles were traveling in the same direction. Because the speed limit on I–40 in that area is fifty-five miles per hour, Deputy Whitlock stopped the driver of the U–Haul at the Watkins Road exit for speeding.

The driver of the U–Haul was Defendant John Hill. Deputy Whitlock exited his patrol car, approached the driver's side of the U–Haul, and asked John for his driver's license. John produced a Florida driver's license; Deputy Whitlock informed him of the reason for the stop; and asked John to exit the U–Haul and step to the back of the vehicle so that Deputy Whitlock would be clear from the heavy traffic flow. Deputy Whitlock noticed that John's hands were shaking "uncontrollably" at the time John handed his license to Deputy Whitlock. John's brother, and co-defendant in this case, Malcolm Scott ***262** Hill ("Scott"), remained seated in the passenger seat of the U–Haul.

Once out of the vehicle, Deputy Whitlock questioned John about his travel plans, to which John replied that his sister was in the military and had been transferred to Pennsylvania, so he and Scott were moving their sister's belongings from Irvine, California to Scranton, Pennsylvania. Deputy Whitlock, who had been in the military himself, found it unusual that John and Scott would be moving their sister's belongings, inasmuch as it had been Deputy Whitlock's experience that people in the military who were transferred to another location usually had their moving arrangements handled by the military. Deputy Whitlock asked John about his sister's whereabouts at the time, and John replied that she had flown to Scranton about one month earlier. Deputy Whitlock described John's statements made during this colloquy as "very deliberate as if it was rehearsed on what he was supposed to be telling me as to the destination and the reason for their trip." Deputy Whitlock then asked John where he and Scott were from, to which John replied that they were from Florida, and that the two had flown to California to assist their sister.

Deputy Whitlock asked John to be seated in the patrol car so that Deputy Whitlock "could write the ticket, check [John's] driver's license, and also [because] it was kind of windy that night, and it was hard to hear due to all the traffic." Once inside the vehicle, Deputy Whitlock continued to question John about his travel plans as Deputy Whitlock completed John's "courtesy" citation. John informed Deputy Whitlock that he was not sure how long he and Scott were going to remain in Scranton, inasmuch as their sister was married and they just needed to help her "offload," and then they could leave.

Deputy Whitlock then returned to the U–Haul to obtain the rental agreement for the truck from Scott. When asked by Deputy Whitlock about his travel plans, Scott stated that he and John were moving their sister to Scranton, Pennsylvania, and that once they got there they were going to stay approximately three or four days to help her unload and to get settled before they flew back to Florida. Scott produced the rental agreement for Deputy Whitlock; the agreement was in Scott's name; it indicated that the truck had been rented on February 19, 1996; and next to the amount tendered on the rental receipt were the initials "CA," which Deputy Whitlock interpreted to mean that Scott had paid for the rental in cash. According to Deputy Whitlock, the significance of the "CA" notation is that it had been his experience that drug dealers commonly pay for everything in cash. Deputy Whitlock later testified that the fact that the truck had been rented on February 19, just four days before the night in question, aroused his suspicion inasmuch as John had told Deputy Whitlock that his sister had moved to Pennsylvania a month beforehand. As Deputy Whitlock spoke with Scott, he noticed a large amount of used Kleenex on the floorboard of the truck. This also aroused Deputy Whitlock's suspicion inasmuch as it had been his experience that people who "snort" cocaine constantly have a "runny" nose which requires constant wiping.

Deputy Whitlock returned to the patrol car and, while waiting for verification of John's driver's license, asked John to sign the "courtesy" citation. Deputy Whitlock then asked John if he and Scott had helped their sister load the U–Haul, to which John answered in the affirmative. Then, when Deputy Whitlock "confronted [John] with the fact that [his sister] had been gone a month, ... he became somewhat confused and stuttered for a minute and changed his story, saying that she had just laid it out on how they were supposed to load the truck." Deputy Whitlock asked John if he could search the U–Haul, but John refused. The verification of John's license came back and indicated that John's license was valid with no restrictions. At that point, Deputy Whitlock decided ***263** to run a canine search using his certified narcotics dog, "Spanky," who was present in Deputy Whitlock's vehicle, and who travels with Deputy Whitlock at all times. Deputy Whitlock later testified that he decided to run the canine search because he had "reasonable suspicion that the

possibility of a narcotics transfer was being made due to the fact [of] the inconsistent stories, the nervousness and the demeanor of both subjects." Deputy Whitlock then placed Scott in the patrol car with John, and ran the canine search, which took about one minute to complete. Up until this point, about twelve minutes had passed from the time Deputy Whitlock pulled over the U–Haul.

Spanky gave a "positive" indication for the presence of narcotics by scratching and biting at the part of the U–Haul where the cab meets the box part of the truck. Because of Spanky's response, and Deputy Whitlock's experience with Spanky on other occasions when the canine elicited the same response to the presence of narcotics, Deputy Whitlock believed that narcotics were present in the U–Haul.

At this point, Deputy Kellerhall arrived on the scene and Defendants were placed in Deputy Kellerhall's vehicle. The Deputies searched the cab of the U–Haul, and no narcotics were found; however, the search did turn up a large number of keys in a bag behind the rear seat. The Deputies assumed that one of the keys would unlock the lock on the rear door of the truck; however, none of the keys worked, so the Deputies cut the lock with bolt cutters. In the meantime, Deputy Segerson arrived on the scene with his certified narcotics canine, "Oz;" the canine did a search of the U–Haul and reacted positively to the same area to which Spanky had reacted positively.

Once the lock was cut from the rear door of the U–Haul, the Deputies began their search of the rear of the truck and found, among other things, five large wardrobe boxes located against the back wall nearest the cab. Inside the wardrobe boxes were what appeared to be tractor tire inner tubes. Deputy Whitlock punctured the tube with his pocketknife, and when he pulled his knife out of the tube, a white substance was on the blade. Deputy Whitlock tested the powder and determined that it was cocaine. Deputy Whitlock then placed Defendants under arrest. The U–Haul was taken into the interstate office; a thorough search of the truck was conducted; and 502 kilograms of cocaine were recovered.

On February 27, 1996, a federal grand jury for the Western District of Tennessee returned a one count indictment against Defendants. The indictment alleged that on February 23, 1996, Defendants possessed with the intent to distribute approximately 502 kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

Thereafter, on April 25, 1996, Defendants filed a joint motion to suppress the evidence—502 kilograms of cocaine. A suppression hearing was held on the motion and, following the hearing, both the government and Defendants filed post-hearing briefs. The district court entered an order denying Defendants' motion to suppress the evidence on July 16, 1997. Defendants pleaded guilty to the one count indictment on December 16, 1997, and pursuant to the plea agreements, Defendants reserved the right to appeal the district court's denial of the motion to suppress the evidence.

Defendants were each sentenced on 135 months' imprisonment to be followed by three years of supervised release. This appeal ensued.

ANALYSIS

The Supreme Court has held that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments, even though the purpose of the stop is limited and the resulting detention is quite brief." *Delaware v.* ***264** *Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). An ordinary traffic stop, however, is more akin to an investigative detention rather than a custodial arrest, and the principles announced in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), apply to define the scope of reasonable police conduct. *United States v. Palomino*, 100 F.3d 446, 449 (6th Cir.1996). Reasonable police conduct under such circumstances is such that any subsequent detention after the initial stop must not be excessively intrusive in that the officer's actions must be reasonably related in scope to circumstances justifying the initial interference. *Palomino*, 100 F.3d at 449 (citing *Terry*, 392 U.S. at 20, 88 S.Ct. 1868). Once the purpose of the traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable and articulable suspicion that criminal activity was afoot. *United States v. Erwin*, 155 F.3d 818, 822 (6th Cir.1998) (*en banc*), *cert. denied*,525 U.S. 1123, 119 S.Ct. 906, 142 L.Ed.2d 904 (1999); *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir.1995).

Recently, in *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 488, 142 L.Ed.2d 492 (1998), a unanimous Supreme Court held that a full-blown search of an automobile and its driver, after an officer had elected to issue the driver a traffic citation rather than arresting the driver, violated the

Fourth Amendment. Because neither the officer's safety nor the need to preserve evidence was implicated by the routine traffic stop, the Court held that once the driver was stopped for speeding and was issued a citation, all of the evidence necessary to prosecute him had been obtained and, without a reasonable suspicion that other criminal activity was afoot, the stop of the vehicle and issuance of a traffic citation did not justify a full search of the vehicle. *Id*. However, the *Knowles* decision does not change the fact that an officer may detain an individual after a routine traffic stop is completed if the officer has a reasonable suspicion that the individual is engaged in criminal activity. *See Erwin*, 155 F.3d at 822. Furthermore, *Knowles* does nothing to the state of the well-settled law that the legality of the traffic stop is not dependent upon an officer's motivations. *See Whren v. United States*, 517 U.S. 806, 812–13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir.1993) (*en banc*), *cert. denied*, 513 U.S. 828, 115 S.Ct. 97, 130 L.Ed.2d 47 (1994). That is to say, an officer may stop a vehicle for a traffic violation when his true motivation is to search for contraband, as long as the officer had probable cause to initially stop the vehicle. *Whren*, 517 U.S. at 812–13, 116 S.Ct. 1769. If the initial traffic stop is illegal or the detention exceeds its proper investigative scope, the seized items must be excluded under the "fruits of the poisonous tree doctrine." *See Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The touchstone of the Fourth Amendment is "reasonableness" based upon the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (citing *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991)).

This Court reviews a district court's decision on a motion to suppress the evidence under " 'two complimentary standards. First, the district court's findings of fact are upheld unless clearly erroneous. Second, the court's legal conclusion as to the existence of probable cause is reviewed *de novo*.' " *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir.1994) (quoting *United States v. Leake*, 998 F.2d 1359, 1362 (6th Cir.1993)) (citations omitted). In reviewing the district court's findings of fact, we consider evidence in the light most favorable to the government. *United States v. Buchanon*, 72 F.3d 1217, 1223 (6th Cir.1995). In addition, we must give deference to the district court's assessment of credibility inasmuch as the court was in the best position to make such a ***265** determination. *See United States v. Bradshaw*, 102 F.3d 204, 210 (6th Cir.1996).

1. The Initial Traffic Stop

In the case at hand, it is questionable as to whether Defendants challenge the district court's finding that Deputy Whitlock had probable cause to make the initial traffic stop of Defendants' U–Haul. Defendants acknowledge in a footnote to their brief that they do not dispute the legality of a pretextual stop after the *Whren* and *Ferguson* decisions; yet, they appear to challenge the district court's finding of probable cause on the basis of Deputy Whitlock's motivation in pursuing their vehicle. Defendants argue that because Deputy Whitlock pursued their vehicle on the basis that it had been his experience that U–Haul trucks carry drugs, his deep-rooted bias colored his thinking. We disagree with Defendants' claim where it is clear that regardless of Deputy Whitlock's motivation in stopping the U–Haul, the stop was valid as long as he had probable cause to make the traffic stop. *See Whren*, 517 U.S. at 812–13, 116 S.Ct. 1769 (holding that the constitutional reasonableness of a traffic stop does not depend upon the officer's actual motivation).[1]

Deputy Whitlock pulled Defendants over for traveling in excess of the speed limit, in that Defendants were traveling sixty-two miles per hour and the posted speed limit in that area is fifty-five miles per hour. As noted by the district court, the Tennessee Code prohibits speeding, *see* Tenn.Code Ann. § 55–8–152, and Defendants do not dispute the fact that they were traveling in excess of the posted speed limit. Therefore, the district court properly concluded that Officer Whitlock had probable cause to make the initial traffic stop. *See United States v. Akram*, 165 F.3d 452, 455 (6th Cir.1999) (finding that where the officer observed a U–Haul failing to signal before changing lanes in violation of Ohio law, the officer had probable cause to stop the U–Haul irrespective of his subjective motivation for doing so); *Palomino*, 100 F.3d at 449 (finding that where the officer observed the defendant speeding and changing lanes without signaling, "even if [the officer] was motivated by a suspicion that the defendant fit into a drug courier profile, the stop was not unreasonable because probable cause existed").

Notably, in *Akram*, this Court recently had occasion to decide whether a police officer had probable cause to stop a U–Haul truck, where the record indicated that although the officer claimed to have stopped the truck for failing to change lanes without signaling in violation of Ohio law, his "true" motivation for stopping the U–Haul was to look for contraband. 165 F.3d at 455. There, the facts indicate that police officers pulled the U–Haul over two days in a row; that the legal reason for pulling the vehicle over on the first day was questionable (going two miles over the posted speed

limit); and that the police officers found illegal videotapes when they searched the vehicle on that day, but that the officers did not arrest the defendants because they did not receive word that they had a legal basis for doing so (i.e., they were not aware of the illegal nature of the tapes) until the defendants had been detained for forty-five minutes and released. *Id.* at 454, 459–60. The facts further indicate that the legal reason for pulling the vehicle over the next day—failure to signal when changing lanes—was not documented on paper anywhere, but brought out near the end of the officer's testimony in a response to a question from the court; and that upon search of the U–Haul, illegal videotapes were found. *Id.* at 454–55, 460.

***266** The two-judge majority in *Akram* reluctantly agreed with the district court's finding that the officer had probable cause to stop the vehicle:

> The dissent makes a strong case for disbelieving [the police officer's] explanation for the February 27 stop. We agree that this case is an example of the very questionable police conduct that is permitted by *Whren* and *Ferguson*. Were the author of this opinion writing on a clean slate, she would hold that the police may not use a trivial traffic violation as a pretext for stopping a vehicle, when their real purpose would not justify a stop. We are, however, bound by the opposite holding. While the dissent demonstrates that the officers were uninterested in the traffic violation and were really looking for drugs, the point of *Whren* and *Ferguson* is that the motives of police are irrelevant.

Akram, 165 F.3d at 455. However, the dissent found that the district court was clearly erroneous in crediting the police officer's version of what occurred, and in therefore concluding that there was probable cause to stop the vehicle. The dissent focused on the fact that rental trucks such as "U–Hauls" have become "profile" or "target" vehicles, and that "[i]t is clear from the number of cases reaching our court that the police within the Sixth Circuit make full use of the technique of stopping vehicles for minor traffic infractions with the hope that circumstances will develop which ultimately will allow them to make a legal search of the vehicle." *Id.* at 457 (Guy, J., dissenting).

The dissent further opined as follows:

> All of the officers involved in this case were part of a highway drug interdiction unit. Although they could, and I assume would, stop vehicles committing egregious traffic offenses, traffic patrol was not their primary mission. Nor do they rely on just "getting lucky" when making truly legitimate traffic stops. This would be a non-productive waste of manpower. It is clear to me from the cases that reach our court—including this one—that the officers are looking for "profile" or "target" vehicles and occupants.
>
> A rental truck is a profile or target vehicle. That this was not admitted by the police officers is not controlling in my view. Credibility is the issue here and, in making credibility determinations, a court can utilize what is specifically part of the record, what has been learned from other similar cases, and all reasonable inferences that can be drawn therefrom. We routinely tell jurors that although they have to decide the case before them on the basis of the testimony and exhibits, they do not have to leave their common sense at the courthouse door. Surely judges, who are more experienced and sophisticated than the average juror about legal matters and court proceedings, are entitled to factor common sense into the credibility equation.
>
> Rental vehicles are profile vehicles because the police know they have become popular with persons transporting contraband. There are several reasons for the popularity. First, they can be obtained at a relatively low cost. Second, when the plates and registrations are checked, they reveal nothing about the vehicle's occupants. Third, they are little more than a large box on wheels and are completely windowless, thus affording privacy to those carrying contraband. Finally, if the vehicle is stopped and contraband is found, there is no worry about forfeiting the vehicle since it does not belong to the wrongdoer.
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> * * * * * *
>
> Legally, the police can now stop a vehicle for any alleged traffic violation and, while the vehicle is stopped, subject it to a canine sniff or hold the vehicle until a dog arrives on the scene. They also can have a profile and stop target vehicles if they find them committing a traffic offense, but —they still must have a legitimate traffic offense as the basis ***267** for the stop. I do not believe the officers did here—but, more importantly, I do not believe the district judge could properly conclude they did on the basis of this record. The courts have given the police this extraordinary power to make pretextual stops and searches of vehicles, but it is also the responsibility of the courts to make sure the testimony of police officers is given the same critical scrutiny given to a defendant's testimony.

Akram, 165 F.3d at 458, 460 (Guy, J., dissenting) (footnotes omitted).

We share in the concern that police officers are using the state of the law in this Circuit as carte blanche permission to stop and search "target" or "profile" vehicles for drugs. Of course, the Supreme Court in *Whren* confirmed that a police officer is legally allowed to stop a vehicle for a traffic violation when there is probable cause for the traffic stop, without regard for the officer's subjective motivation. *See* 517 U.S. at 812–13, 116 S.Ct. 1769. However, we agree that it is the responsibility of the courts to make sure that police officers act appropriately and not abuse the power legally afforded to them by, among other things, carefully scrutinizing a police officer's testimony as to the purpose of the initial traffic stop. Although U–Hauls may in fact be used to carry illegal contraband, the potential for police officers to abuse the *Whren* principle is apparent, and when applied to "target" vehicles such as U–Hauls—which are typically used by lower income people to move who do not have many personal belongings and cannot afford the expense of a professional moving company, or typically used by young college students making their first move from home—the abuse becomes particularly distasteful.

In the case at hand, the facts related to the purpose of the stop are essentially not in dispute and, as stated, it is questionable whether Defendants even challenge the propriety of the stop. Although Deputy Whitlock testified that he began following Defendants because they were traveling in a U–Haul and it has been his experience that U–Hauls carry contraband, his legal reason for initially stopping the vehicle—speeding—is not challenged here to the extent that Defendants do not claim that they were traveling at the posted speed limit. Furthermore, by speeding Defendants were in fact committing a traffic infraction under Tennessee law. Therefore, under *Whren*, *Ferguson* and their progeny, the district court's conclusion that Deputy Whitlock had probable cause to stop the U–Haul must be upheld.

This, however, is not the end of the relevant inquiry, and leads to another check on the authority provided to police officers under *Whren* —the fact that the officer must conduct the stop with the least intrusive means reasonably available and not detain the individual longer than necessary to effectuate the purpose of the stop, unless the officer has an articulable reasonable suspicion that the individual is engaged in criminal activity. *See Mesa*, 62 F.3d at 162–63. As with the concern that the courts must be particularly careful in scrutinizing a police officer's purpose for initially stopping a "target" vehicle, we believe that the courts must also carefully scrutinize a police officer's conduct during the course of such a stop to insure that it is limited to effectuating the purpose of the stop. Likewise, the courts must carefully scrutinize an officer's stated reasons for detaining the individual beyond the purpose of the stop to insure that the reasons rise to the level of reasonable suspicion, so that the officer does not abuse his authority under *Whren*.[2]

2. Detention

Defendants focus their argument on appeal on the reasonableness of their detention ***268** by Deputy Whitlock. Defendants argue that Deputy Whitlock 1) unreasonably questioned them beyond the scope of the traffic stop, 2) deliberately conducted the stop in such a fashion so as to prolong the time necessary to complete the purpose of the traffic stop, and 3) did so without an articulable reasonable suspicion. We disagree.

a. Questioning by Deputy Whitlock and His Method of Conducting the Initial Stop (Defendants' First and Second Arguments)

Defendants argue that Deputy Whitlock improperly engaged in a series of questions unrelated to the stop. The questions to which Defendants take issue related to whether Defendants were "moving" and, if so, where they were moving to and from. Defendants contend that such questions were improper because they did not relate to the purpose of the stop—speeding—and because Deputy Whitlock could not have had a reasonable suspicion to question Defendants outside the scope of the stop inasmuch as Deputy Whitlock began asking John these questions immediately after the stop.

In *Erwin*, an *en banc* panel of this Court held as follows:

> [I]rrespective of whether the deputies were justified in detaining [the defendant] after he showed no signs of intoxication, and even if they had not, after approaching [the defendant], observed conditions raising reasonable and articulable suspicion that criminal activity was "afoot," they were entitled to ask [the defendant] for permission to search his vehicle. A law enforcement officer does not violate the Fourth Amendment merely by approaching an individual, even when there is no reasonable suspicion that a crime has been committed, and asking him whether he is willing to answer some questions.

155 F.3d at 822–23 (citing *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). Although it is true that the Supreme Court stated in *Royer* that "an

investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop, [while] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time," *see* 460 U.S. at 500, 103 S.Ct. 1319, Deputy Whitlock's questioning of John as to his moving plans at the outset of the stop was reasonable in that the questions related to John's purpose for traveling. *See Erwin*, 155 F.3d at 822–23; *see also United States v. Potts*, No. 97–6000, 1999 WL 96756, at *3 (6th Cir.1999), *cert. denied*, 528 U.S. 822, 120 S.Ct. 66, 145 L.Ed. 2d 57 (1999) (finding that "an officer is free to ask traffic-related questions, and questions about a driver's identity, business and travel plans during the course of a traffic stop").

Defendants also contend that Deputy Whitlock consciously tailored the stop to draw out its duration so as to allow time to investigate his "hunch" that Defendants were using the U–Haul to transport drugs. Specifically, Defendants argue that Deputy Whitlock ran a check on John's driver's license late in the stop, separated Defendants, and did not request the rental agreement from John when he initially asked for John's driver's license. Defendants note that four minutes and seventeen seconds transpired from the time Deputy Whitlock called John's driver's license into dispatch for verification until the time Deputy Whitlock received the results. Defendants argue that if Deputy Whitlock had performed the driver's license check at the beginning of the stop, instead of after he had already questioned John, the purpose of the stop would have been over when Deputy Whitlock handed John the courtesy citation (i.e., the verification of the license would have been received). Defendants conclude that this factor is significant inasmuch as the government includes events which occurred after John was handed the citation as ***269** grounds for Deputy Whitlock's reasonable suspicion that criminal activity was afoot. We disagree with Defendants' contention, where the record shows that Deputy Whitlock did not purposefully extend the purpose of the traffic stop and, as discussed *infra*, during the course of the stop Deputy Whitlock was developing reasonable suspicion that criminal activity was afoot.

The stop occurred at approximately 20:41:35; after a brief conversation with Deputy Whitlock, John was asked to have a seat in the patrol car at approximately 20:43:27; less than seven minutes later, Deputy Whitlock ran the license check; and the driver's license verification came back four minutes and seventeen seconds after it was requested. The record indicates that during the period of time from which Deputy Whitlock asked John to have a seat in the patrol car until the time that he ran the check on John's driver's license, Deputy Whitlock wrote out the courtesy citation, retrieved the rental agreement from the U–Haul, spoke with Scott, and returned to the patrol car. Upon returning to the patrol car, Deputy Whitlock ran the check on John's driver's license and while waiting for the results, questioned John about his travel plans once again inasmuch as Scott's description of the travel plans was inconsistent with John's description. Upon receiving the notification that John's license was valid in the state of Florida, Deputy Whitlock then placed Scott in the patrol car with John and proceeded to allow Spanky to do a canine sniff of the U–Haul.

Based upon the above factual scenario, the district court's findings of fact on this issue were not clearly erroneous. The district court specifically found as follows regarding Defendants' detention:

> In the present case, defendants cannot successfully claim that the detention, from its inception through the return of the diver's license check, exceeded its original scope. It is uncontested that in a valid traffic stop, an officer can request a driver's license, registration or rental papers, run a computer check thereon, and issue a citation. In this case, Whitlock asked John Hill to produce his driver's license and to exit the vehicle. He then requested that John Hill sit in the front of the police car while Whitlock filled in the courtesy citation. Whitlock then left the vehicle to obtain rental papers. When he returned, Whitlock called for a computer check of the license. While waiting for verification of John Hill's license, Whitlock gave the courtesy citation to John Hill for his signature.
>
> The questioning occurred while Whitlock performed these tasks and waited for the results of the computer check. Therefore, the questioning did nothing to extend the duration of the initial, valid stop. Furthermore, the entire traffic stop, up to the return of the computer check, lasted little more than twelve minutes. Contrary to defendants' contentions, there is simply no indication that Whitlock intentionally prolonged the stop by delaying the license check, separating the defendants, or requesting the rental papers. Whitlock was entitled to perform these tasks and did so in a sufficiently efficient manner, as was his standard procedure.

(J.A. at 45–46) (footnotes omitted).

When viewing the course of events which took place at the time of the stop under a totality of the circumstances and in the light most favorable to the government, the district court properly found and concluded that the detention, from its inception through the return of the driver's license check, did not exceed its original scope. As noted *supra*, the touchstone of the Fourth Amendment is reasonableness based upon the totality of the circumstances. *See Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). To accept Defendants' position that Deputy Whitlock purposefully tailored the stop to draw out its duration would require the Court to view the stop not under the totality of the circumstances but, ***270** rather, in an unreasonable piecemeal fashion so as to draw a bright line limitation as to an officer's course and conduct during a stop. *See United States v. Place*, 462 U.S. 696, 709, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) ("declin[ing] to adopt an outside time limitation for a permissible *Terry* stop"). Of course, one must be mindful of the police officer's duty to conduct the stop with the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time, *see Royer*, 460 U.S. at 500, 103 S.Ct. 1319; however, nothing in the record suggests that Deputy Whitlock's actions were unreasonable. *See United States v. Bradshaw*, 102 F.3d 204, 212 & n. 18 (6th Cir.1996) (finding that the police officer lawfully detained the "nervous" and "jittery" defendant in the patrol car after the initial stop until the officer performed the radio checks and issuance of the citation, and noting that "*Mesa* does not require that reasonable suspicion be present 'up-front' for an officer to detain a motorist in his squad car while conducting a records search that is related to the traffic violation for which the motorist was stopped").

Furthermore, even if Deputy Whitlock had run the driver's license check at the outset of the stop—i.e., when he initially placed John inside the patrol car—that still would have provided Deputy Whitlock four minutes and seventeen seconds to ask Scott about the travel plans and to determine that Scott's answers were inconsistent with John's answers about the plans, such that Deputy Whitlock would have determined it necessary to have Spanky do a canine sniff of the U–Haul. In short, accepting Defendants' argument does nothing to change the fact that Deputy Whitlock still would have had time to further develop his reasonable suspicion that Defendants were in engaged in criminal activity.

b. Whether Deputy Whitlock had Reasonable Suspicion of Criminal Activity (Defendants' Third Argument)

Defendants argue that the district court erred when it found that Deputy Whitlock had reasonable suspicion to detain Defendants after the completion of the traffic stop. Specifically, Defendants note that verification of John's valid Florida driver's license was received by Deputy Whitlock before he ran the canine search of the U–Haul, and conclude that because they were detained without reasonable suspicion while Deputy Whitlock conducted the canine search, the positive results of the canine search should have been suppressed. Defendants contend that the district court's findings as to why Deputy Whitlock held a reasonable suspicion are clearly erroneous when taken individually as well as when considered in total, inasmuch as Deputy Whitlock lacked credibility. We disagree.

When addressing whether Deputy Whitlock had a reasonable suspicion that Defendants were engaged in criminal activity so as to detain them beyond the purpose of the traffic stop—i.e., so as to allow Deputy Whitlock to detain Defendants for the approximately one or two minutes it took Spanky to run the search of the vehicle, the district court found as follows:

> In forming his suspicions, Whitlock was entitled to assess the circumstances and defendant's [sic] in light of his experience as a police officer and his knowledge of drug courier activity. *See United States v. Cortez*, 449 U.S. 411, 416, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) ("[E]vidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."); *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir.1996).
>
> Whitlock testified that his suspicions were aroused by a number of factors: 1) the unusual explanation of the defendants' cross-country trip, 2) the deliberate, or rehearsed, manner in which John Hill answered Whitlock's questions, 3) the apparent cash rental of the U–Haul truck, 4) John Hill's uncontrollably ***271** shaky hands and apparent nervousness, 5) the sweating and apparent nervousness of the passenger Malcolm [Scott] Hill, 6) the inordinate number of used Kleenex littering the U–Haul's floorboard, 7) John Hill's confusion in explaining how and when his sister's furniture had been loaded, and 8) the defendants' inconsistent responses regarding their itinerary.

> When questioned by Whitlock about their purpose and destination, defendants indicated that they had flown cross-country from Florida to California to help their sister make a military transfer to Scranton, Pennsylvania. Defendants also explained that their sister had already moved and had been in Pennsylvania for a month. Whitlock found it unusual that the defendants' sister would have her brothers fly cross-country to help her move when the military normally paid for military moves and took care of such arrangements. Whitlock's skepticism of defendant's [sic] explanation was confirmed, as previously noted by the court, through Dabney's testimony. Whitlock's suspicion was justifiably aroused and contributed to a reasonable suspicion of illegal activity.

* * * * * *

> The defendants' nervous behavior, Scott Hill's profuse perspiration, and John Hill's deliberate responses also caught Whitlock's attention....
>
> Within the course of the traffic stop, Whitlock also noticed that the U–Haul rental agreement contained the notation "CA" across from the amount tendered. Whitlock reasonably assumed "CA" to indicate that the U–Haul had been paid for in cash. In Whitlock's experience on the Interstate Interdiction Unit, U–Haul vehicles had been used to transport illegal drugs on numerous occasions. Furthermore, Whitlock testified that it was common for drug couriers to pay for such rentals in cash to maintain anonymity....
>
> Inside the U–Haul, Whitlock noticed an inordinate number of Kleenex on the floorboard, which he believed to be a possible indication of cocaine use....
>
> Whitlock's suspicions were also aroused by inconsistent statements by defendants regarding their travel plans.... Although the inconsistency between the two stories is slight, when viewed in light of the many other suspicious factors surrounding the stop, it was not unreasonable for Whitlock to focus on these discrepancies.
>
> Taken individually, some of the factors establishing reasonable suspicion in this case would be susceptible to innocent explanations. The totality of the circumstances, however, plainly supported a reasonable suspicion of illegal activity. Therefore, the detention to allow for a dog sniff was permissible.

(J.A. at 48–51) (footnote and citations omitted). In short, the district court found that Deputy Whitlock possessed a reasonable suspicion that Defendants were engaged in the transportation of illegal drugs so as to detain Defendants for an additional minute or so beyond the purpose of the stop based upon 1) Defendants' implausible explanation for their cross-country trip; 2) Defendants' inconsistent statements regarding their travel itinerary; 3) the possibility that at least of one of the Defendants were using cocaine; and 4) the Defendants' nervous demeanor during the stop.

In *United States v. Cortez*, the Supreme Court set forth parameters to determine an articulable suspicion as follows:

> Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized ***272** and objective basis for suspecting the particular person stopped of criminal activity.
>
> The [assessment of the whole picture] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (citations omitted). Applying these principles to the facts of the instant case, the district court properly concluded that Deputy Whitlock detained Defendants beyond the duration of the traffic stop based upon a reasonable suspicion that Defendants were engaged in the transportation of drugs, where the district court's findings of fact were not clearly erroneous.

It is reasonable to conclude that one of the factors contributing to Deputy Whitlock's suspicion that Defendants were engaged in criminal activity was Deputy Whitlock's belief that Defendants provided an implausible explanation for their trip —moving their sister who was in the military from California to Pennsylvania because she had been relocated. This explanation aroused Deputy Whitlock's suspicions inasmuch as it had been his experience that people in the military did

not have to move their belongings themselves when relocated; the military moved the belongings for them. Defendants argue that because they presented testimony from Dawn Dabney, a civilian employee at the Millington Naval Reserve Center, stating that military personnel are given the option of moving themselves (a "Do–It–Yourself" or "DITY" move), and about twenty-five percent of the military moves are done in such a fashion, the district court's finding was clearly erroneous. We disagree where Dabney's testimony also indicates that seventy-five percent of military moves are handled in the fashion in which Deputy Whitlock believed they are handled.

Furthermore, it is also reasonable to conclude that Defendants' inconsistent stories regarding their travel itinerary—i.e., John claiming that he and Scott were just going to drop off their sister's belongings and then leave; Scott claiming that the two were going to stay about three or four days and then leave; John claiming that their sister had flown out to Pennsylvania about a month beforehand, then claiming that she had assisted them in loading the truck, then claiming that she laid the belongings out for the men to load before she left—also contributed to Deputy Whitlock's suspicion that Defendants were engaged in criminal activity. Finally, it was reasonable to conclude that Deputy Whitlock's observance of the large amount of used Kleenex on the floorboard of the truck, indicating that one or both of Defendants were using cocaine based upon his experience as an interdiction officer that cocaine users have to wipe their noses often, as well as Defendants' nervous demeanor contributed to his suspicion that criminal activity was afoot. *See* *Palomino*, 100 F.3d at 450 (finding that the defendant's inconsistent stories about the ownership of the car and purpose of the trip, his nervousness, and the odor that the police officer smelled when the defendant rolled down his window aroused a reasonable suspicion of criminal activity justifying the officer's inquiry into whether the defendant was carrying contraband).

Accordingly, when viewing the evidence in the light most favorable to the government and under a totality of the circumstances using a common-sense approach, the district court did not err in finding that Deputy Whitlock had formed a reasonable suspicion that Defendants were carrying contraband sufficient to justify extending the purpose of the traffic stop to allow Spanky to do a canine sniff of the U–Haul. ***273** We are not persuaded otherwise by Defendants' attack on Deputy Whitlock's credibility, where the district court credited Deputy Whitlock as being a credible witness and where nothing in the record supports Defendants' contention to the contrary. *See* *Bradshaw*, 102 F.3d at 210 (finding that because the district court was in the best position to judge credibility, and because the court plausibly resolved the discrepancies in the testimony, its findings of fact should not be disturbed); *compare* *Akram*, 165 F.3d at 457–60 (Guy, J., dissenting) (finding the district court's findings of fact clearly erroneous based upon the incredible nature of the officer's testimony).

3. Search

Defendants challenge the district court's conclusion that Deputy Whitlock had probable cause to search their U–Haul as a result of a positive indication by Spanky, only to the extent that Defendants challenge Spanky's training and reliability. Defendants do not challenge the fact that a positive indication by a properly trained narcotics detecting dog is sufficient to establish probable cause to search for the presence of a controlled substance. We believe that Defendant's argument is without merit.

One of the exceptions to the requirement that the government obtain a warrant before searching private property is the "automobile exception," which excuses the police from obtaining a warrant when they have probable cause to believe that a vehicle they have stopped contains evidence of a crime. *See* *United States v. Pasquarille*, 20 F.3d 682, 690 (6th Cir.1994) (citing *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925)). It is well-established in this Circuit that an alert by a properly-trained and reliable dog establishes probable cause sufficient to justify a warrantless search of a stopped vehicle. *See* *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir.1994).

Defendants contend that the district court's finding that Spanky was a properly trained and reliable drug detection dog was clearly erroneous because Deputy Whitlock testified that he did not know exactly what training he was actually required to perform with Spanky as his handler, and because Deputy Whitlock failed to keep records of the number of times Spanky indicated a "false alert." Essentially, Defendants challenge the government's failure to produce records to establish Spanky's training and reliability.

In *Diaz*, this Court rejected a similar argument on the basis that despite the lack of the production of records, the credible testimony established the dog's ("Dingo's") proper training and reliability. *See* 25 F.3d at 395. Specifically, in *Diaz*, "[the defendant] argue[d] that the government could not establish Dingo's reliability because [the officer] failed to bring the dog's training and performance records to court and so was

unable to answer precisely how many searches Dingo had done and how many times drugs were not discovered when Dingo indicated, [and because] ... [the officer] and Dingo were improperly trained." *Id*. In rejecting the defendant's claim and finding that the district court's finding of fact as to Dingo's reliability was not clearly erroneous, the Court stated that "[the officer] testified as to her and Dingo's training, certification, and experience. The district judge heard the testimony and made a credibility determination: [the officer] was believable. [The officer's] testimony supports a finding that Dingo was trained and reliable. After reviewing the record, we are not left with a definite and firm conviction that a mistake has been made." *Id*.

Likewise, in the instant case, after reviewing the record we are not left with a firm and definite conviction that a mistake has been made regarding the district court's finding that Spanky was trained and reliable. Testimony from Lieutenant Mark Robinson indicated that he had been the supervisor of the canine unit for the ***274** past eight years and was a certified canine trainer. Lieutenant Robinson testified that he trained both Deputy Whitlock to be a canine handler and Spanky to be a drug detection dog. Lieutenant Robinson described the extensive procedures under which Spanky was trained, and stated that Spanky passed each level of the extensive training such that Spanky was a certified drug detection dog. In addition, Lieutenant Robinson testified that Spanky passed post-certification training as well. Finally, Lieutenant Robinson stated that he had reviewed the training and performance records kept by the Shelby County Sheriff's Department on Spanky and other drug detection dogs, and in his professional opinion, Spanky was reliable.

Accordingly, as in *Diaz*, Defendants' challenge to the district court's finding that Spanky was a properly trained and reliable drug detection dog must fail. Deputy Whitlock therefore had probable cause to search the U–Haul inasmuch as Spanky gave a positive alert to the presence of drugs when Deputy Whitlock ran the canine search. *See Diaz*, 25 F.3d at 394–95.

CONCLUSION

In summary, the district court properly found that Deputy Whitlock had probable cause to stop Defendants for speeding; properly found that Deputy Whitlock had a reasonable suspicion to detain Defendants beyond the purpose of the stop; and properly found that Deputy Whitlock had probable cause to search the U–Haul based upon Spanky's alert. Accordingly, we conclude that the district court did not err in denying Defendants' motion to suppress the 502 kilograms of cocaine found in the U–Haul. We therefore **AFFIRM** the district court's order denying Defendants' motion to suppress the evidence.

All Citations

195 F.3d 258, 1999 Fed.App. 0351P

Footnotes

1 We hasten to note that although the Supreme Court has held that an officer's subjective motivations play no role in ordinary, probable cause Fourth Amendment analysis, the Court has held that an officer's actual motivation is considered when a claim is brought under the Equal Protection Clause for selective enforcement of the law based on considerations such as race. *See Whren*, 517 U.S. at 813, 116 S.Ct. 1769.

2 Notably, the defendant in *Akram* did not challenge whether the officers had a reasonable suspicion to detain him for forty-five minutes beyond the scope of the initial stop. 165 F.3d at 456 n. 4.

100 F.3d 164
United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America, Appellee,

v.

Kevin MANGUM, Appellant.

No. 95–3033.
|
Argued Oct. 31, 1996.
|
Decided Nov. 22, 1996.

Synopsis

After his motions to suppress and for disclosure of informant's identity were denied, 871 F.Supp. 1486, defendant was convicted in the United States District Court for the District of Columbia, Charles R. Richey, J., of unlawful possession of a firearm by a convicted felon. Defendant appealed. The Court of Appeals, Wald, Circuit Judge, held that: (1) scope and duration of investigatory stop of vehicle in which defendant was passenger was reasonable; (2) defendant, who denied ownership of knapsack in response to officer's question, lacked standing to challenge search of knapsack; (3) defendant was not entitled to severance of ex-felon element of unlawful possession of firearm by convicted felon charge from possession element; (4) disclosure of informant's identity was not warranted; and (5) trial court acted within bounds of its authority when it questioned police officer at trial regarding stakeout.

Affirmed.

***166 **350** Appeal from the United States District Court for the District of Columbia (No. 94cr00411–01).

Attorneys and Law Firms

Howard B. Katzoff, appointed by the court, Washington, DC, argued the cause, and filed the briefs, for appellant.

William D. Weinreb, Assistant United States Attorney, argued the cause, for appellee, with whom Eric H. Holder, Jr., United States Attorney, John R. Fisher, Elizabeth Trosman and Peter R. Zeidenberg, Assistant ***167 **351** U.S. Attorneys, Washington, DC, were on the brief.

Before: WALD, SENTELLE and ROGERS, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

Kevin D. Mangum appeals from a judgment entered by the United States District Court for the District of Columbia convicting him after a jury trial of unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and sentencing him to 37 months of incarceration. We reject his appeal and affirm his conviction.

On October 18, 1994, Mangum was indicted on five counts: (1) unlawful possession of a firearm by a convicted felon (18 U.S.C. § 922(g)(1)) (Count One); (2) possession of a firearm with an obliterated, removed, changed or altered serial number (18 U.S.C. § 922(k)) (Count Two); (3) carrying a pistol without a license (D.C.Code § 22–3204(a)) (Count Three); (4) possession of an unregistered firearm (D.C.Code§ 6–2311(a)) (Count Four); and (5) unlawful possession of ammunition (D.C.Code § 6–2361(3)) (Count Five).[1] Appellant filed three pretrial motions: (1) a motion to suppress evidence; (2) a motion for disclosure of confidential informant and exculpatory information; and (3) a motion to bifurcate trial, or, in the alternative, for severance of counts. Following a hearing, the district court denied the first two motions and disposed of the third by severing Count One of the indictment from the remaining counts. The judge then held a jury trial on Count One, and the jury found Mangum guilty. Appellant was sentenced to 37 months of incarceration and the government voluntarily dismissed the four remaining counts of the indictment.

All five charges against Mangum arose out of an incident on September 3, 1994, when police, acting on an informant's tip, stopped appellant and removed a gun from a knapsack that was in the trunk of the car in which he was a passenger. In late August 1994, Detective Andre Williams, a six-year veteran of the Metropolitan Police Department ("MPD"), received a detailed tip from a confidential informant that appellant carried a gun each day to his place of employment, a barbershop in the 700 block of H Street, N.E., and kept the gun in his knapsack while he worked. The informant stated that appellant normally left work with the gun at the end of the day and was picked up by friends in a black Nissan automobile bearing Virginia license plates numbered NOL–

113. Detective Williams conveyed this information to several other police officers (including Officer Leon Johnson, also of the MPD), telling them that appellant was a six-foot-tall, light-skinned, stockily-built man named Kevin Mangum, and he subsequently provided the officers with appellant's picture.

On September 3, 1994, Officer Johnson received word from Detective Williams that appellant was in the barbershop with the gun and would probably emerge from the shop fifteen minutes before it closed.[2] Johnson and two other officers parked their car a block away from the barbershop and watched as a black Nissan automobile fitting the earlier description drove up and Mangum emerged from the barbershop carrying a brownish knapsack. The driver of the automobile got out and opened the trunk, and appellant placed the knapsack in the trunk. At that point, the driver returned to his seat, and Mangum got into the car on the other side. The car then pulled away from the shop.

Shortly thereafter, the officers stopped the car, asked its occupants to get out, patted them down for weapons and, finding none, asked the driver to open the car's trunk. The driver opened the trunk, and Officer Johnson removed the knapsack. He asked the driver and Mangum in turn whether the knapsack belonged to them. Both of them ***168 **352** disclaimed ownership. Mangum stated: "it's not my bag, it's the driver's." Transcript ("Tr.") I, at 26–27, 37. Officer Johnson then searched the knapsack, finding inside a pair of shorts containing Mangum's driver's license and a loaded handgun.

The confidential informant who gave the tip to Detective Williams had been arrested about three years earlier and had agreed to provide information to the police in exchange for a favorable disposition of his case. Since that time, the informant had provided information on approximately 30–35 occasions. *Id.* at 41–42. This information had proved reliable every time, and on at least six occasions, it had resulted in criminal convictions.

On appeal, appellant claims that the district court erred in denying each of his three pretrial motions. Additionally, appellant contends that he was prejudiced by the trial judge's allegedly erroneous questioning of a government witness. We find that none of appellant's contentions has merit. Accordingly, we affirm the conviction.

I. Discussion

A. *Suppression of Evidence Under Fourth Amendment*

Appellant filed a pretrial motion to suppress evidence, which the district court denied. The court found that the police had probable cause to stop the car and search the knapsack on the basis of the reliable informant's detailed tip and the officers' corroboration of this tip. Appendix of Appellant ("A.A.") 14–18. The court also held that the appellant lacked standing to challenge the search of the knapsack because he had disclaimed ownership of and therefore had no privacy interest in the bag. A.A. 20–21. The court found that the officers could not and need not have obtained a search warrant prior to stopping the car, since they did not have probable cause to search appellant until they had corroborated the details of the tip by observing Mangum. Finally, the court held that the police did not arrest appellant prior to finding the gun, but had only conducted a lawful "investigative detention and weapons search" pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A.A. 14–16.[3]

On appeal, Mangum argues that the district court erred in refusing to suppress the evidence obtained during the stop and search of the car in which Mangum was a passenger. Appellant concedes that the police officers' corroboration of the informant's tip provided reasonable articulable suspicion for an investigative *Terry* stop of the vehicle and pat-down of its occupants. Brief of Appellant, at 12. However, he claims that, because "the detention, seizure, and search exceeded the scope of a legitimate investigative stop," the stop crossed the line into a warrantless "arrest" that was unjustified by probable cause and the evidence thereby seized must be suppressed. *Id.* at 16, 88 S.Ct. at 1877. Appellant advances four reasons why the stop crossed the line into an arrest: (1) three police cars and seven or eight officers were involved in the stop; (2) appellant was not free to leave or refuse to answer the officers' questions; (3) the officers did not conduct "further investigation" before they opened the trunk and searched appellant's bag; and (4) the officers had already intended to arrest him when they removed him from the automobile. *Id.* at 14–15, 88 S.Ct. at 1876–77.

The government counters that the trial court did not err when it refused to suppress the evidence. Its response proceeds on a number of theories: (1) seizing the gun and other items from appellant's backpack was not the "fruit" of his detention under the Fourth Amendment; (2) the investigatory stop never crossed the line to being an arrest; (3) even if appellant

was arrested, the arrest was justified by probable cause; and (4) appellant lacked standing to challenge the seizure of the knapsack since he had disclaimed ownership of it. Brief for Appellee, at 7.

We agree with the government that the trial judge did not err in refusing to ***169** ****353** suppress the evidence obtained during the stop and search of the car in which Mangum was a passenger because the legitimate investigatory stop never turned into an arrest and because Mangum lacked standing to challenge the search of his knapsack.[4] It is true that the "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]" and therefore is subject to the limitation that it be "reasonable" under the circumstances. *Whren v. United States,* 517 U.S. 806, ——, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). A legitimate investigatory stop may cross the line into an arrest "if the duration of the stop or the amount of force used is 'unreasonable' under the circumstances." *United States v. Laing,* 889 F.2d 281, 285 (D.C.Cir.1989). The government carries the burden of showing that the measures employed during the stop were justified.

We conclude that the scope and duration of the investigatory stop at issue here were reasonable under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny. Based on their corroboration of the innocent details of the tip, the officers clearly had a reasonable, articulable suspicion sufficient to stop the car in which Mangum was a passenger, to complete a protective weapons search of its occupants, and to conduct reasonable further investigation. In *Adams v. Williams,* the Supreme Court held that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily *while obtaining more information,* may be most reasonable in light of the facts known to the officer at the time." 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972) (emphasis added). Moreover, it is well-recognized that "officers' orders to the occupants to get out of the car for questioning [are] compatible with an investigatory stop." *United States v. White,* 648 F.2d 29, 36–37 (D.C.Cir.). Here, the officers did no more than was permissible under these precedents. After stopping the car and ordering its occupants to step outside, the officers conducted an expeditious pat-down for weapons and then promptly asked the driver to open the trunk. The driver consented to the request. Removing the knapsack, one officer then asked whether it belonged to the driver or to Mangum. When both denied ownership, the officer opened the bag and found the gun, along with appellant's shorts with identification in the pocket. Throughout this process, the officers were diligent in pursuing their investigation. *United States v. Sharpe,* 470 U.S. 675, 686, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985) ("In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."). The entire investigatory stop lasted only a few minutes, until the officers found the gun and officially arrested Mangum. Additionally, as the district court properly found, there was no evidence in the record of any threat or use of force that would have converted the stop into an arrest. A.A. 16.

Finally, none of appellant's specific objections to the investigatory stop demonstrate that it was not reasonable or that it crossed the line into an illegal arrest. First, we know of no case that has held it unreasonable for seven or eight officers to aid in the stop of a car carrying four passengers when there is no showing of any threat or exertion of unlawful force by those officers.[5] Second, although the government concedes that appellant was not free to leave the scene during the stop, that fact alone does not convert the stop into an arrest. *See, e.g., United States v. Moore,* 817 F.2d 1105, 1108 (4th Cir.), *cert. denied,* ***170** ****354** 484 U.S. 965, 108 S.Ct. 456, 98 L.Ed.2d 396 (1987) (holding that "[t]he perception ... that one is not free to leave is insufficient to convert a *Terry* stop into an arrest" and that "[a] brief but complete restriction of liberty is valid under *Terry*"). Third, it is not clear what appellant is objecting to in claiming that the police failed to complete "further investigation" prior to opening the trunk of the car and searching appellant's knapsack. Indeed, the officers were pursuing further investigation by asking the driver if he would open the trunk and by attempting to ascertain the proper ownership of the knapsack.[6] Finally, even if appellant had produced evidence showing that the officers intended to arrest appellant prior to stopping him and finding the gun,[7] such evidence would be irrelevant. In determining whether a stop or search is reasonable under the Fourth Amendment, courts look to objective evidence, not subjective intentions. *Whren v. United States,* 517 U.S. 806, ——, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996) (rejecting the proposition that "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"); *Terry,* 392 U.S. at 21, 88 S.Ct. at 1879 (adopting objective standard for determining reasonableness of searches or seizures under

the Fourth Amendment). We therefore find that none of appellant's four objections have merit.

In addition to finding the *Terry* stop reasonable, we also conclude that appellant lacks standing to challenge the search of his knapsack. In the course of the investigatory stop, as duly explained above, the officers asked the driver of the car to open the trunk, which he did.[8] Officer Johnson removed the knapsack from the car. When Mangum was asked whether the bag was his, he denied ownership. On these facts, we need not reach the issue of whether the police officers had probable cause to search appellant's knapsack. Because Mangum disclaimed ownership of the bag, he "abandoned" his property and waived any legitimate privacy interest in it. Courts have long held that, when a person voluntarily denies ownership of property in response to a police officer's question, "he forfeits any reasonable expectation of privacy in [the property]; consequently, police may search it without a warrant." *United States v. Lewis,* 921 F.2d 1294, 1302 (D.C.Cir.1990). Accordingly, Mangum has no standing to challenge the search of his bag on Fourth Amendment grounds.

We conclude that the officers' investigatory stop of appellant was not an arrest and that appellant lacked standing to contest the officers' search of his knapsack since he disclaimed ownership of it. Thus, we find that the district court did not err in denying appellant's motion to suppress evidence gleaned from the stop and search.

B. *Severance of Count One*

In its memorandum opinion, the district court stated that, "without objection [it] bifurcated the trial such that count one, unlawful possession of a firearm by a Convicted Felon, would be tried alone, while the other four counts would be tried together at a later date." A.A. 28. Appellant argues that the district court erred in failing to sever the ex-felon element from the possession element ***171** ****355** for the trial on Count One.[9] The government disputes whether appellant properly raised this issue in the proceedings below. But even assuming, *arguendo,* that he did raise it, we find that the district court did not abuse its discretion by severing Count One from the other counts and trying Count One first, nor did it abuse its discretion by deciding not to bifurcate the ex-felon element and the other elements of Count One.

Appellant relies on *United States v. Dockery,* 955 F.2d 50 (D.C.Cir.1992), in which this court held that it was an abuse of discretion for a trial court to join an ex-felon firearms count with three drug counts in light of "defense motions to sever, to introduce the defendant's prior conviction by stipulation or to try the count to the judge," as well as numerous references by the prosecution at trial to the defendant's prior conviction. *Id.* at 50. The *Dockery* court concluded that the trial court had not shown "sufficient scrupulous regard for the defendant's rights" when it refused to sever the ex-felon count from the separate drug distribution counts. *Id.* at 56 (internal quotation marks and citation omitted). Appellant argues that his situation is sufficiently like *Dockery* to make the trial court's decision an abuse of discretion. Although the trial court here did agree to sever the ex-felon count from the other counts for trial, appellant claims that "the prejudicial spillover from the 'ex-felon' evidence was not cured because the jury was allowed to consider it with respect to the felon-in-possession charge itself." Brief of Appellant, at 21.

We conclude that the trial court did not abuse its discretion by not severing the prior felony element from the other elements of the crime. This case is sharply distinguishable from *Dockery,* where the trial court refused to sever the ex-felon *count* from the other *counts* against the defendant. In this case, the trial court only refused to sever the ex-felon *element* from the *element* of appellant's possession of a gun that had traveled in interstate commerce; both were elements of the same count. This court's decisions in *Dockery* and *United States v. Daniels* guard against the joinder of a felon-in-possession count with other counts because of the "high risk of undue prejudice" insofar as such joinder allows evidence of a defendant's prior felony conviction "to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." *Daniels,* 770 F.2d 1111, 1116 (D.C.Cir.1985).[10] When faced with the risk posed by joinder of separate charges, trial courts should consider other measures that assure a fair trial, such as holding "a bench trial or a separate trial on the ex-felon count," or withholding evidence of a prior felony conviction until after the jury has reached a verdict with regard to the possession element. *Dockery,* 955 F.2d at 55 n. 4. Since the trial court here complied with this mandate by severing the ex-felon count from the other counts—which were later dismissed by the government anyway—appellant's claim is without merit.[11]

***172** ****356** C. *Nondisclosure of Identity of Informant*

Appellant claims that the district court erred by denying appellant's motion to compel disclosure of the confidential government informant's identity. Mangum argued that the

informant was a relevant and necessary witness for the defense, that the informant might have been motivated by his desire to curry favor with the government, and that the informant might have had physical access to Mangum's knapsack, in which the gun was found. Tr. I, at 5–7, 9, 12, 14, 16–18.[12] At the hearing, Mangum argued that he needed to interview the informant in order to determine whether the informant might have planted the gun in the knapsack in order to help secure an arrest and curry favor with the government. *Id.* at 6–7, 53–54.

The district court rejected Mangum's motion. After explaining the relevant legal standards, the court found that the defendant was not entitled to know the informant's identity "[b]ecause there is no evidence in the record supporting the Defendant's speculation that the informant actively participated in the offense." A.A. 25. Thus, the defendant had failed to meet his burden by "showing that the informant's testimony is necessary to his defense so as to justify placing the informant's safety in jeopardy." *Id.*

We conclude that the district court did not abuse its discretion by rejecting Mangum's motion to disclose the identity of the informant. In general, defendants seeking disclosure of an informant's identity bear a "heavy burden" in establishing that disclosure is warranted. *United States v. Warren,* 42 F.3d 647, 654 (D.C.Cir.1994) (quoting *United States v. Skeens,* 449 F.2d 1066, 1071 (D.C.Cir.1971)). This court has held that "[m]ere speculation that the informer might possibly be of some assistance is not sufficient to" meet this burden. *United States v. Skeens,* 449 F.2d 1066, 1070 (D.C.Cir.1971) (internal quotation marks omitted). In order "to overcome the public interest in the protection of the informer," the defendant is obligated to show that the informer was "an actual participant in or a witness to the offense charged," whose identity is "necessary to [the] defense." *Id.* at 1070, 1071.

Appellant has failed to meet this burden here. The district court was correct in finding that appellant's assertion that the informant was a participant or witness whose testimony was necessary to the defense was purely speculative. Appellant offered no evidence in support of that assertion other than to point to the tip itself, which, in his view, suggested that the informant had access to the knapsack on the day of the offense. Yet, as the government convincingly argues, the substance of the informant's tip—that Mangum generally carried a gun in his knapsack as he went to and from work—did not indicate that the informant had any access to the knapsack. *See* Brief for Appellee, at 37–38. For example, the informant might have learned this information from something appellant said. Moreover, the tip was given to police approximately one week prior to appellant's arrest, and there appears to be no way that the informant would have known precisely when the police were going to stake out the barbershop and arrest the appellant. *Id.* at 38.[13] Finally, the government proffered ***173 **357** that the informant was not a participant in or witness to the crime. A.A. 38–39. On these facts, the trial judge's factual finding that "nothing in this record establishes that the informant was a participant, an eyewitness, or a person who was otherwise in a position to give direct testimony concerning the crime" was not clearly erroneous. A.A. 23 (internal quotation marks and citations omitted). Accordingly, we affirm the district court's finding that appellant did not meet his burden of showing that the informant was an actual participant in or witness to the crime charged.

D. *Trial Judge's Questioning of Witness*

Appellant argues that the trial court erred in asking two questions of Officer Johnson, a government witness, during Johnson's direct testimony at trial about the events that occurred on the date of appellant's arrest. The following interchange is at issue:

> THE COURT: Had you observed this barbershop before the incident you're now describing?
>
> THE WITNESS: Yes, sir.
>
> * * * * * *
>
> THE COURT: And if so, for how long?
>
> THE WITNESS: Yes, on a prior date, we were there watching the barbershop, observing Mr. Mangum, and we were waiting for him to come out of the barbershop, but the barbershop closed and we never saw him come out. So, evidently, he had got out of the barbershop without us seeing him.

Tr. II, at 43. Appellant objected to both questions, but these objections were denied. Appellant argues that he is entitled to a new trial on the basis of prejudice caused by the two questions. He contends that the testimony elicited by the court's queries "unnecessarily highlighted the fact that appellant was the target of the tipster's information and that they have been observing him on more than one occasion." Brief of Appellant, at 26. He also claims that the testimony "inaccurately suggested that [appellant] somehow eluded law

enforcement on the prior occasion, perhaps intentionally." *Id.* at 27.

We reject appellant's claim that the district court erred in this regard. It is well-established that trial judges may question witnesses. *See, e.g., United States v. Spencer,* 25 F.3d 1105, 1109 (D.C.Cir.1994) (citing Fed.R.Evid. 614(b)). This authority is subject only to the limitations that the judge "remain a disinterested and objective participant in the proceedings," that he "hold to a minimum his questioning of witnesses in a jury trial," and that he avoid questions that extend to advocacy. *United States v. Norris,* 873 F.2d 1519, 1526 (D.C.Cir.1989) (collecting cases) (internal quotation marks omitted). Where objection is made to the trial court's questions, any error in those questions shall be disregarded so long as it is harmless under Federal Rules of Criminal Procedure 52(a).

On the facts at issue here, we find that the trial judge was well within the bounds of his authority to question a witness, since his participation was minimal and he clearly limited his inquiries to those that "a disinterested and objective participant" would ask. Indeed, the record indicates that the judge was merely seeking clarification of testimony that he perceived to be ambiguous. As the government aptly points out, "Judge Richey could reasonably have been concerned that Officer Johnson might ... be failing to distinguish rigorously between the events of the two [separate] dates" on which the police observed appellant based on the information given in the tip. Brief for Appellee, at 48. This is a perfectly plausible explanation for the court's questions and puts the questions well within the court's discretion. In any event, even assuming *arguendo* that the court's questions were erroneous, the error was harmless. The questions neither ***174** ****358** affected a fundamental right of the appellant, nor did they affect the outcome of a close case. The questions addressed an issue (how many times the police had set up an observation post outside the barbershop) that was peripheral to the main issues in the case, and any impact the questions might have had on the jury was insignificant in relation to the overwhelming evidence against Mangum.

II. Conclusion

For the foregoing reasons, we reject all of appellant Mangum's challenges to his conviction under 18 U.S.C. § 922(g)(1).

Affirmed.

All Citations

100 F.3d 164, 321 U.S.App.D.C. 348

Footnotes

1 Count One, unlawful possession of a firearm by a convicted felon, is the only count at issue here. After the prosecution succeeded in obtaining a conviction on Count One, it dismissed the other charges against Mangum.

2 On one prior occasion, the police had waited outside the barbershop for Mangum, but he never emerged. Apparently, he had left the shop that day without the police seeing him.

3 The court had no occasion to reach the issue whether, if appellant had been found to be unlawfully arrested prior to the search of the knapsack, suppression of the evidence would have been required.

4 Because we base our decision on these grounds, we need not reach the issues of (1) whether seizing the gun from appellant's knapsack was the "fruit" of his detention under the Fourth Amendment; or (2) whether the police had probable cause to arrest Mangum.

5 In addition to Mangum and the driver, two passengers were seated in the back seat of the car.

6 Moreover, as explained below, appellant lacks standing to challenge the search of the knapsack itself.

7 On the contrary, there does not appear to be any such evidence in the record. Indeed, if the police officers had not found a gun in the knapsack, it seems clear that the appellant would have been released.

8 Appellant questions whether the driver's opening of the trunk was truly voluntary. Brief of Appellant, at 14 n.9. The district court found that, "[a]fter patting down the car's occupants, the officers *asked* the driver to open the vehicle's trunk." A.A.

12 (emphasis added). We may not overturn a district court's finding of fact unless it is clearly erroneous, and appellant has produced no evidence to demonstrate that there was clear error here.

But even if the driver had not consented to the search of the trunk, Mangum has no standing to challenge the search because he was not the owner of the car. It is well-established that passengers traveling in a car in which they have no possessory interest have no legitimate expectation of privacy vis-a-vis a search of the car itself. *See, e.g., United States v. Zabalaga,* 834 F.2d 1062, 1065 (D.C.Cir.1987); *Rakas v. Illinois,* 439 U.S. 128, 133–34, 99 S.Ct. 421, 424–26, 58 L.Ed.2d 387 (1978).

9 Another approach deemed acceptable by the appellant was for the district court to sever Count One from Counts Two through Four and try the latter counts first. It is unclear to us how this would have aided the appellant in any way. The purpose of his motions to sever was to prevent the jury's knowledge of Mangum's prior felony conviction for receiving stolen property from prejudicially affecting the jury's finding as to whether or not Mangum possessed the firearm in the first instance. Trying Count One to a new jury after Counts Two through Four had been tried by the first jury would in no way prevent any alleged prejudice to the defendant.

10 In contrast, this evidence is obviously admissible here because showing that Mangum was a convicted felon was a necessary element of the government's case.

11 A number of our sister circuits have reached the same conclusion on this issue. In *United States v. Collamore,* the First Circuit reversed a district court's decision to bifurcate the prior felony conviction issue from the possession issue on a felon-in-possession charge. The court reasoned in part that

> when a jury is neither read the statute setting forth the crime nor told of all the elements of the crime, it may, justifiably, question whether what the accused did was a crime. The present case is a stark example. Possession of a firearm by most people is not a crime. A juror who owns or who has friends and relatives who own firearms may wonder why [the defendant's] possession was illegal. Doubt as to the criminality of [the defendant's] conduct may influence the jury when it considers the possession element.

868 F.2d 24, 28 (1st Cir.1989). *Accord United States v. Gilliam,* 994 F.2d 97, 101–02 (2d Cir.), *cert. denied,* 510 U.S. 927, 114 S.Ct. 335, 126 L.Ed.2d 280 (1993); *United States v. Jacobs,* 44 F.3d 1219, 1222 (3d Cir.), *cert. denied,* 514 U.S. 1101, 115 S.Ct. 1835, 131 L.Ed.2d 754 (1995); *United States v. Aleman,* 609 F.2d 298, 310 (7th Cir.1979), *cert. denied,* 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980); *United States v. Barker,* 1 F.3d 957, 959 (9th Cir.1993), *modified,* 20 F.3d 365 (9th Cir.1994); *United States v. Brinklow,* 560 F.2d 1003, 1006 (10th Cir.1977), *cert. denied,* 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 798 (1978); *United States v. Birdsong,* 982 F.2d 481, 482 (11th Cir.), *cert. denied,* 508 U.S. 980, 113 S.Ct. 2984, 125 L.Ed.2d 680 (1993).

12 Mangum never cited any specific facts supporting his motion to disclose the identity of the informant. He merely asserted that it was necessary to his case that he interview the informant because the informant might possess information that could exculpate Mangum.

13 The court also denied appellant's “Motion Requesting an Evidentiary Hearing on Identity of Informant and Reconsideration of Disclosure” in light of the evidence adduced at the first day of the trial. The trial court did not abuse its discretion. Taking additional testimony or making findings concerning the informant's “proximity and opportunity of access” to the knapsack would have tended to reveal the identity of the informant. Tr. I, at 21, 51. Since appellant had failed to meet his heavy burden of showing a need for the informant's identity in the first instance, the court did not abuse its discretion in denying appellant's request for findings as well.

597 F.3d 492
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellant,

v.

Jose NAVAS, Jose Alvarez, and Arturo Morel, Defendants-Appellees, Fausto Velez, Fernando Delgado, Pedro Ventura, Antonio Morel, and Euris Velez, Defendants.[*]

Docket No. 09-1144-cr.
|
Argued: Jan. 27, 2010.
|
Decided: March 8, 2010.

Synopsis

Background: In a prosecution for conspiracy to possess and distribute more than five kilograms of cocaine, the government filed interlocutory appeal from order of the United States District Court for the Southern District of New York, William H. Pauley, III, J., 640 F.Supp.2d 256, which granted in part the defendants' motions to suppress evidence.

The Court of Appeals, Wesley, Circuit Judge, held that automobile exception to warrant requirement applied to search of trailer unhitched from tractor.

Reversed and remanded.

Attorneys and Law Firms

***493** Telemachus P. Kasulis, Assistant United States Attorney (Katherine Polk Failla, Assistant United States Attorney, on the brief), for Preet Bharara, United States Attorney for the Southern District of New York, New York, NY, for Appellant.

Patrick J. Joyce, New York, NY, for Appellee, Jose Navas.

Lawrence D. Gerzog, New York, NY, for Appellee, Jose Alvarez.

Susan G. Kellman, Brooklyn, NY, for Appellee, Arturo Morel.

Before: LEVAL and WESLEY, Circuit Judges, and GLEESON, District Judge.[**]

Opinion

WESLEY, Circuit Judge:

This appeal concerns a trailer, unhitched from its cab and parked in a warehouse. The district court held that a warrantless search of the trailer ran afoul of the ***494** Fourth Amendment. On appeal, defendants liken the trailer to a fixed structure, and argue that the district court properly suppressed the fruits of the search. The government argues that, whether or not attached to a cab, the trailer is subject to a warrantless search pursuant to the "automobile exception" to the Fourth Amendment's warrant requirement. As the trailer was readily mobile and commanded only a diminished expectation of privacy, we hold that the automobile exception applies. Therefore, we reverse.

I. BACKGROUND

A. Facts

The information leading to defendants' arrests was provided to the Drug Enforcement Administration ("DEA") by a cooperating witness who himself had been arrested for a narcotics-related offense. The witness informed the DEA that he was a member of a narcotics distribution enterprise that shuttled large quantities of narcotics and illicit proceeds between California and New York City. The *modus operandi* of the group, according to the cooperating witness, was to transport the contraband in hidden "traps" located within trailers that contained more mundane freight.[1] In addition to providing information about the nature of the narcotics trafficking scheme, the cooperating witness also implicated defendant-appellee Jose Navas and provided the number of a cellular telephone that was subsequently linked to Navas following further investigation.

On October 27, 2008, the government obtained an order from a magistrate judge in the Southern District of New York that authorized law enforcement officers to track the location of the phone.[2] On November 4, 2008, agents assigned to the Drug Enforcement Task Force observed that the phone was approaching the Bronx. Based on that observation,

agents were dispatched to the Hunts Point Terminal ***495** Market to conduct surveillance.[3] During the afternoon, one of the agents identified Navas at the Market. He was seen unloading a tractor trailer with out-of-state license plates, aided by an individual later identified as defendant-appellee Jose Alvarez. Later that night, Navas and Alvarez drove the tractor trailer to a private warehouse on Drake Street in the Bronx, approximately one half mile from the Hunts Point Market. At the warehouse, the agents watched Navas open the garage door, park the tractor trailer in the warehouse, unhitch the cab, and lower the legs in the front of the trailer to stabilize it. Navas and Alvarez then drove the cab out of the warehouse, closed its garage door, and drove away. Some of the surveilling agents pursued Navas and Alvarez, and others remained at the warehouse.

Navas and Alvarez proceeded to a nearby McDonald's restaurant, where they parked the cab on the street. A male later identified as defendant Fernando Delgado approached the cab and engaged in a discussion with Navas and Alvarez. After the conversation, Delgado entered a black Lincoln Town Car with Ohio license plates, which then parked in the McDonald's parking lot. Delgado exited that vehicle, spoke again with Navas and Alvarez, and then entered a silver Honda Odyssey parked adjacent to the Lincoln. Thereafter, approximately five individuals exited the Honda with black duffel bags.

The agents at the scene then arrested Navas, Alvarez, Delgado, and the remaining occupants of the Lincoln and the Honda. Searches incident to those arrests revealed that the duffel bags removed from the Honda were empty, but that additional bags within that vehicle contained gloves, drills, and drill bits. The agents patted down the arrestees and transported them back to the warehouse, where they were issued *Miranda* warnings in Spanish and patted down a second time. After receiving *Miranda* warnings, Navas "admitted that he was a driver for drug traffickers, that the trailer was being delivered to a member of the trafficking organization, and that narcotics were stowed in a secret rooftop compartment of the trailer." *Navas,* 640 F.Supp.2d at 261.

During the pat-down of an arrestee later identified as defendant-appellee Arturo Morel, an agent noticed a "large box-like object" in Morel's right front pants pocket. The agent testified at the suppression hearing that Morel stated that the object was "the garage door opener to [his] house," but the garage door of the warehouse opened when the agent "inadvertently" "touch[ed]" it.[4] *Id.* at 261. After further discussion, Morel verbally consented to a search "inside [the warehouse at] 528 Drake Street and anything that was in there." *Id.* Morel also executed a written Consent Form, but neither the agents nor Morel completed the portion of the form calling for a description of the area to be searched.

Following Morel's consent, the agents entered the warehouse and conducted the search at issue in this appeal. Acting on information from Navas's post-arrest statement and the cooperating witness, they examined the top of the trailer and observed physical indicia of a secret compartment. ***496** The agents then "ripped off the sheet metal roof" of the trailer, discovered 230 kilograms of cocaine, and promptly seized the contraband. *Id.* at 262.

B. Procedural History

Following the November 4, 2008 arrests, eight defendants were indicted on November 19, 2008. The indictment charges a single count of conspiracy to possess and distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846. In early 2009, defendants-appellees Navas, Alvarez, and Morel filed separate motions to suppress. The central issues raised by their motions related to the government's cell site surveillance, the searches incident to the arrests, and the search of the trailer. The district court conducted a suppression hearing on February 24, 2009, at which the government offered testimony from three of the agents who participated in the investigation. Navas and Alvarez also submitted evidence in affidavit form.

On March 19, 2009, the district court issued a decision granting in part and denying in part the motions. The district court rejected the challenges to the cell site surveillance. *See Navas,* 640 F.Supp.2d at 263-64. It also held that defendants' arrests were supported by probable cause, and that the searches of their persons, the Honda, the Lincoln, and the cab were all lawful searches incident to those arrests. *See id.* at 265-66.

Finally, the district court held that the search of the trailer in the warehouse violated the Fourth Amendment. It began by rejecting the government's argument that Morel's consent was sufficient to permit the search. The district court found it "undisputed that Morel verbally consented to a general search of the warehouse," but concluded that his consent did not extend to a physically invasive search of the trailer. *Id.* at

267.[5] Therefore, the court held, the warrantless search of the trailer was not justified by the consent doctrine. *Id.*

Turning to the application of the automobile exception, the district court took the view that the doctrine "generally relates to some type of vehicle that is capable of moving on its own." *Id.* at 267. Framed as such, the court held that the exception was inapplicable because "[a] stationary trailer, detached from a tractor cab with its legs dropped, and stored inside a warehouse, is not a vehicle that is readily mobile or in use for transportation." *Id.* Based on its holdings that Morel's consent did not extend to a search of the trailer and that the automobile exception was inapplicable, the district court ordered that the narcotics evidence be suppressed. *Id.* at 268.

II. DISCUSSION

We review *de novo* the district court's legal conclusion regarding the constitutionality of the search. *E.g., United States v. Plugh,* 576 F.3d 135, 140 n. 5 (2d Cir.2009). The district court's findings of fact, as well as its probable cause determination, are undisputed. Furthermore, in light of the district court's finding that "Morel verbally consented to a general search of the warehouse," the agents were lawfully within that structure. *Navas,* 640 F.Supp.2d at 267. To justify the search of the trailer, the government relies exclusively on the automobile exception. Consequently, we are left with a straightforward ***497** legal question: Is the warrantless search of a trailer that is unhitched from its cab permissible under the automobile exception to the Fourth Amendment's warrant requirement? We hold that the exception applies.

A. The Automobile Exception

We begin our inquiry on well-tread ground. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted). One such exception is the "automobile exception." It permits law enforcement to conduct a warrantless search of a readily mobile vehicle where there is probable cause to believe that the vehicle contains contraband. *E.g., Pennsylvania v. Labron,* 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) (per curiam). Where the probable cause upon which the search is based "extends to the entire vehicle," the permissible scope of a search pursuant to this exception includes " 'every part of the vehicle and its contents [including all containers and packages] that may conceal the object of the search.' " *United States v. Harwood,* 998 F.2d 91, 96 (2d Cir.1993) (alteration in original) (quoting *United States v. Ross,* 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)); *see also California v. Acevedo,* 500 U.S. 565, 580, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

The Supreme Court has relied on two rationales to explain the reasonableness of a warrantless search pursuant to the automobile exception: vehicles' inherent mobility and citizens' reduced expectations of privacy in their contents. *See, e.g., California v. Carney,* 471 U.S. 386, 391, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985); *see also United States v. Howard,* 489 F.3d 484, 492 (2d Cir.2007). One of the seminal cases defining the exception, *Carroll v. United States,* emphasized vehicles' mobility:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *see also Carney,* 471 U.S. at 390, 105 S.Ct. 2066 (characterizing *Carroll* as being based on "a long-recognized distinction between stationary structures and vehicles"). Based on this reasoning, courts have held that vehicular mobility is a sufficient exigency to permit law enforcement to invoke the doctrine. *E.g., Maryland v. Dyson,* 527 U.S. 465, 466-67, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999).

In addition to the mobility rationale, other authority emphasizes that warrantless searches pursuant to the automobile exception are also reasonable because citizens possess a reduced expectation of privacy in their vehicles. *See Carney,* 471 U.S. at 393, 105 S.Ct. 2066.

> "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine

> vehicles when license plates or inspection stickers ***498** have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order."

Id. at 392, 105 S.Ct. 2066 (quoting *South Dakota v. Opperman,* 428 U.S. 364, 368, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)). Thus, citizens' reasonable expectations of privacy in their vehicles are reduced by the far-reaching web of state and federal regulations that covers not only vehicles but also our nation's roadways. As a result, warrantless searches of readily mobile vehicles, when based on probable cause, are reasonable under the Fourth Amendment.

Although we have characterized the mobility and reduced-privacy rationales as "distinct," they are related. *Howard,* 489 F.3d at 492. A vehicle's mobility has given rise to "a range of ... regulation[s] inapplicable to a fixed dwelling," which has in turn reduced citizens' reasonable expectations of privacy in their vehicles. *Carney,* 471 U.S. at 393, 105 S.Ct. 2066. Consequently, when a vehicle is both inherently mobile and subject to a reduced expectation of privacy-as we conclude is true of the trailer in this case-a warrantless search supported by probable cause is permissible under the automobile exception.

B. Mobility

The phrase "readily mobile" is frequently used as a term of art to describe the mobility rationale. *See, e.g., Dyson,* 527 U.S. at 467, 119 S.Ct. 2013; *Howard,* 489 F.3d at 492-93; *United States v. Gaskin,* 364 F.3d 438, 456 (2d Cir.2004). As we recently made clear, a vehicle's inherent mobility-not the probability that it might actually be set in motion-is the foundation of the mobility rationale. *See Howard,* 489 F.3d at 493. In our view, this rationale supports the application of the automobile exception to the warrantless search of the trailer.

As we have already indicated, the mobility rationale originates from the Prohibition Era case of *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). There, the Supreme Court upheld a warrantless search of a car stopped on a highway where the officers had probable cause to believe that the vehicle's occupants, two bootleggers, were transporting "intoxicating spirituous liquor" in violation of the National Prohibition Act. *Id.* at 134, 45 S.Ct. 280. The *Carroll* Court conducted a historical inquiry and found a distinction between the Fourth Amendment's application to a search of a "store, dwelling house, or other structure," for which a warrant was required, and a search of a "movable vessel" such as a "ship, motor boat, wagon, or automobile," "where it is not practicable to secure a warrant." *Id.* at 151, 153, 45 S.Ct. 280. To explain the distinction, the Court reasoned that a vessel of the latter type could be "quickly moved" and "readily ... put out of reach of a search warrant." *Id.* at 151, 153, 45 S.Ct. 280.

Under our case law, the mobility rationale articulated in *Carroll* does not turn on case-by-case determinations by agents in the field regarding either the probability that a vehicle could be mobilized or the speed with which movement could be achieved. Rather, "[w]hether a vehicle is 'readily mobile' within the meaning of the automobile exception has more to do with *the inherent mobility of the vehicle* than with the potential for the vehicle to be moved from the jurisdiction, thereby precluding a search." *Howard,* 489 F.3d at 493 (emphasis added).

In *Howard,* we sustained two roadside vehicular searches that were conducted while the vehicles' occupants were being questioned at New York State Troopers' ***499** barracks. *Id.* at 492-96. In doing so, we attributed error to the district court's decision "to regard the actual ability of a driver or passenger to flee immediately in the car, or the likelihood of him or her doing so, as a requirement for the application of the automobile exception." *Id.* at 493. We also pointed out that "the district court's inquiry into ... the proximity of the drivers and passenger to the vehicles ... [was] misplaced." *Id.* at 494. Instead, "[t]he mere inherent mobility of [a] vehicle is sufficient to constitute the 'ready mobility' the automobile exception cognizes." *Id.*

In light of *Howard*'s emphasis on inherent mobility and the practical concerns that animate the mobility rationale, the district court erred in its assessment of the trailer sans cab. It started by wrongly characterizing the automobile exception as "generally relat[ing] to some type of vehicle that is capable of moving on its own." *Navas,* 640 F.Supp.2d at 267. However, when the Supreme Court introduced the mobility rationale in *Carroll,* it referenced "wagon[s]," which, like trailers, require an additional source of propulsion before they can be set in motion. *Carroll,* 267 U.S. at 153, 45 S.Ct. 280; *see also Ross,* 456 U.S. at 820 n. 26, 102 S.Ct. 2157 (referring to "contraband ... transported in a horse-drawn carriage"). A wagon is not "capable of moving on its own," but the *Carroll* Court considered it to present mobility concerns similar to those presented by the car searched in that case. And, at least for purposes of the Fourth Amendment, a trailer unhitched from a cab is no less inherently mobile than a wagon without a horse.

The district court's adoption of a false premise-*i.e.,* that the automobile exception centers on a vehicle's ability to "mov[e] on its own"-led it to place undue emphasis on the fact that the trailer was disconnected from a cab at the time of the search. However, the trailer remained inherently mobile as a result of its own wheels and the fact that it could have been connected to *any* cab and driven away. For similar reasons, we are unpersuaded by the district court's reference to the position of the trailer's "legs." These legs served only as a temporary stabilization mechanism. They could be retracted and a cab could be attached to the trailer. As such, the fact that the trailer was "detached from a ... cab with its legs dropped," *Navas,* 640 F.Supp.2d at 267, did not eliminate its inherent mobility.

Moreover, contrary to defendant Morel's assertion, a trailer "with its legs dropped," *id.,* is quite unlike a motor home with its wheels "elevated on blocks," *Carney,* 471 U.S. at 394 n. 3, 105 S.Ct. 2066. Trailers are routinely parked, legs dropped, with the expectation of promptly returning them to the road as soon as they have been loaded or a cab becomes available to haul them. The dropping of the legs in no way suggests that the trailer will not promptly return to service on the highways. In contrast, the raising of a motor home onto blocks is a more elaborate process, less easily undone, which might "objectively indicate[ ] that [the motor home] is being used as a residence" rather than a vehicle. *Id.* The position of a trailer's legs conveys no such impression. There is no question that the trailer in this case was being used as a vehicle and not a residence.

Finally, the district court also erred by relying on the location of the defendants and the agents at the time of the search. "Even where there is little practical likelihood that the vehicle will be driven away, the [automobile] exception applies ... when that possibility exists" because of the vehicle's inherent mobility. *Howard,* 489 F.3d at 493. The district court concluded ***500** that this standard was not satisfied, reasoning that it was "hard to imagine a scenario where the [trailer] could have been hooked up to a cab" because "[d]efendants were under arrest, and more than a dozen government agents surrounded the warehouse." *Navas,* 640 F.Supp.2d at 268. As in *Howard,* the district court appears to have erroneously regarded "the actual ability of a driver or passenger to flee immediately in the [vehicle], or the likelihood of him ... doing so, as a requirement for the application of the automobile exception." 489 F.3d at 493. Although the arrestees were detained and the warehouse was secured by the agents, these facts had no bearing on the inherent mobility of the trailer itself.

In reasoning otherwise, the district court suggested that, instead of performing the search, the agents were required to halt an ongoing investigation in order to wait at the scene and ensure that the trailer remained secure while a search warrant was obtained. The Fourth Amendment does not necessitate such a course of action. The agents had probable cause to conduct the search, and "an automobile 'search is not unreasonable if based upon facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*' " *Howard,* 489 F.3d at 495 (emphasis in original) (quoting *Dyson,* 527 U.S. at 467, 119 S.Ct. 2013). The "justification to conduct such a warrantless search does not vanish once the car has been immobilized." *Michigan v. Thomas,* 458 U.S. 259, 261, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982).

If the agents had left the area around the warehouse, the inherent mobility of the trailer would provide ample cause for concern that it could be removed from the jurisdiction. For example, as we observed in *Howard,* "confederates in another car, of whom the police were unaware, might have observed the police intervention and might drive the [trailer] away." 489 F.3d at 493-94. The district court referenced this hypothetical, but apparently found it inapposite because the warehouse was "surrounded" by "more than a dozen government agents." *Navas,* 640 F.Supp.2d at 268. However, the very function of the automobile exception is to ensure that law enforcement officials need not expend resources to secure a readily mobile automobile during the period of time required to obtain a search warrant.

In sum, the trailer in this case was: (1) affixed with at least one axle and a set of wheels; and (2) capable of being attached to a cab and driven away. Therefore, we conclude that the trailer was inherently mobile at the time of the search, notwithstanding the fact that it was unhitched from the cab that initially transported it to the warehouse. Accordingly, we hold that the mobility rationale militates in favor of the conclusion that the search of the trailer was lawful under the automobile exception.

C. Reduced Expectation of Privacy

The district court also failed to properly consider the reduced-privacy rationale underlying the automobile exception. Although it acknowledged the " 'diminished expectation of privacy enjoyed by the drivers and passengers,' " the court

discarded this proposition and repeated its mobility-based holding that "the unhitched trailer in the warehouse [did] not constitute a vehicle in use for transportation." *Navas,* 640 F.Supp.2d at 268 (quoting *Howard,* 489 F.3d at 494). This failure to account for defendants' reduced expectation of privacy in the trailer was also error.

Indeed, the reduced-privacy rationale applies forcefully here. Agents had observed the trailer being used for transportation. Unlike the motor home in *Carney,* the trailer bore no objective indicia ***501** of residential use that might give rise to elevated privacy expectations in its contents. Moreover, any expectation of privacy that defendants may have harbored in the trailer was significantly diminished by the "pervasive schemes" of state and federal regulation to which it was subject. *Carney,* 471 U.S. at 392, 105 S.Ct. 2066; *cf. New York v. Burger,* 482 U.S. 691, 700, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (reasoning that expectations of privacy are "particularly attenuated in commercial property employed in 'closely regulated' industries"). Several of our sister circuits have held that the interstate commercial trucking industry is pervasively regulated to an extent that justifies a warrantless administrative search of a tractor trailer. *See, e.g., United States v. Delgado,* 545 F.3d 1195, 1201-02 & n. 3 (9th Cir.2008). Although the foundation for the administrative search exception to the warrant requirement is entirely distinct from the rationales underlying the automobile exception, the discussion of the applicable regulatory structures in this authority is instructive. Based on the nature and scope of the regulations relating to the commercial trucking industry, we are persuaded that defendants' reasonable expectations of privacy in the trailer were minimal. Therefore, the reduced-privacy rationale provides further support for our conclusion that the warrantless search of this inherently mobile trailer was reasonable under the Fourth Amendment.

III. CONCLUSION

For the foregoing reasons, we hold that the automobile exception applies because the trailer was inherently mobile, and defendants possessed a significantly reduced expectation of privacy in the trailer. Accordingly, the district court's order is **REVERSED** insofar as it granted the motion to suppress, and the matter is **REMANDED** for further proceedings consistent with this opinion.

All Citations

597 F.3d 492

Footnotes

* The Clerk of the Court is respectfully directed to amend the official caption of this action to conform to the caption listed above.

** The Honorable John Gleeson, United States District Court for the Eastern District of New York, sitting by designation.

1 At the suppression hearing conducted by the district court, one of the agents who participated in the challenged search testified that he was "not really a truck guy." Perhaps as a result, there is a dearth of evidence in the record regarding the nature of the vehicle at issue and some confusion in the district court's terminology. The district court used the word "cab" to describe what we understand to be "[t]he noncargo carrying power unit that operates in combination with a semitrailer or trailer." 23 C.F.R. § 658.5 (Department of Transportation regulation defining the terms "tractor" and "truck tractor"). In some parts of its decision, the court used the term "tractor trailer" to describe what we understand to be a "nonautomotive highway ... vehicle designed to be hauled" by a "cab." *Webster's Third New International Dictionary of the English Language* 2424 (2002). At other times, the court referred to the object of the search simply as a "trailer." The testimony from the hearing suggests that it was in fact only the trailer portion of a tractor trailer. Thus, for purposes of clarity, we adopt the district court's use of the term "cab" and refer to the vehicle searched as a "trailer." We only use the phrase "tractor trailer" to denote times at which the cab and the trailer were connected.

2 The order was issued pursuant to 18 U.S.C. §§ 3121-26, 2703(d), which were enacted in Titles II and III of the Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, 100 Stat. 1848 (1986). *See United States v. Navas,* 640 F.Supp.2d 256, 262 (S.D.N.Y.2009). The surveillance authorized by the order allowed the agents to approximate the phone's geographic position by monitoring the "cell site" information transmitted between the phone and the antenna towers in its vicinity. *See In re Application of the U.S. for an Order for Prospective Cell Site Location Info. on a Certain Cellular Telephone,* 460 F.Supp.2d 448, 450-52 (S.D.N.Y.2006) (describing the mechanics and investigative uses of cell

site information). The district court denied defendants' motions to suppress evidence collected pursuant to this order, and those holdings are not at issue in this appeal. *See* *Navas,* 640 F.Supp.2d. at 262-63.

3 The Hunts Point Terminal Market is located on Halleck and Spofford Streets in the Bronx. It is one of the largest wholesale produce and meat processing centers in the world. *See* *United States v. Alfisi,* 308 F.3d 144, 147 (2d Cir.2002). Products are shipped there via air, rail, and road.

4 The district court specifically credited this aspect of the agent's testimony, and its credibility determination is unchallenged. *See* *Navas,* 640 F.Supp.2d at 261 & n. 2.

5 In addition to defendants-appellees' arguments relating to the automobile exception, Alvarez separately argues that we may affirm the district court based on the alternative ground that “the search of the warehouse was performed ... without consent.” Because this assertion ignores the district court's ruling that Morel consented to a general search of the warehouse, we reject it.

102 S.Ct. 2157
Supreme Court of the United States

UNITED STATES, Petitioner
v.
Albert ROSS, Jr.

No. 80-2209.
|
Argued March 1, 1982.
|
Decided June 1, 1982.

Synopsis

Defendant was convicted before the United States District Court for the District of Columbia, William R. Bryant, Chief Judge, of possession of narcotics with intent to distribute, and he appealed. The Court of Appeals, Ginsburg, Circuit Judge, 210 U.S.App.D.C. 342, 655 F.2d 1159, reversed and remanded, and certiorari was granted. The Supreme Court, Justice Stevens, held that police officers who had legitimately stopped automobile and who had probable cause to believe that contraband was concealed somewhere within it could conduct warrantless search of the vehicle as thorough as a magistrate could authorize by warrant, since scope of warrantless search of automobile is not defined by nature of container in which the contraband is secreted, but rather, it is defined by the object of the search and places in which there is probable cause to believe that it may be found.

Reversed and remanded.

Justice Blackmun and Justice Powell filed concurring opinions.

Justice White dissented and filed opinion.

Justice Marshall dissented and filed opinion in which Justice Brennan joined.

****2159 *798** *Syllabus*[*]

Acting on information from an informant that a described individual was selling narcotics kept in the trunk of a certain car parked at a specified location, District of Columbia police officers immediately drove to the location, found the car there, and a short while later stopped the car and arrested the driver (respondent), who matched the informant's description. One of the officers opened the car's trunk, found a closed brown paper bag, and after opening the bag, discovered glassine bags containing white powder (later determined to be heroin). The officer then drove the car to headquarters, where another warrantless search of the trunk revealed a zippered leather pouch containing cash. Respondent was subsequently convicted of possession of heroin with intent to distribute-the heroin and currency found in the searches having been introduced in evidence after respondent's pretrial motion to suppress the evidence had been denied. The Court of Appeals reversed, holding that while the officers had probable cause to stop and search respondent's car-including its trunk-without a warrant, they should not have opened either the paper bag or the leather pouch found in the trunk without first obtaining a warrant.

Held: Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant. Pp. 2162-2173.

(a) The "automobile exception" to the Fourth Amendment's warrant requirement established in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, applies to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. In this class of cases, a search is not unreasonable if based on objective facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. Pp. 2162-2164.

(b) However, the rationale justifying the automobile exception does not apply so as to permit a warrantless search of any movable container that is believed to be carrying an illicit substance and that is found in a public place-even when the container is placed in a vehicle (not otherwise believed to be carrying contraband). *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538; *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235. Pp. 2165-2167.

***799** (c) Where police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search. The scope of the search is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which

there is probable cause to believe that it may be found. For example, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Pp. 2168-2172.

(d) The doctrine of *stare decisis* does not preclude rejection here of the holding in *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, and some of the reasoning in *Arkansas v. Sanders, supra.* Pp. 2172-2173.

210 U.S.App.D.C. 342, 655 F.2d 1159, reversed and remanded.

Attorneys and Law Firms

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Opinion

****2160** Justice STEVENS delivered the opinion of the Court.

In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, the Court held that a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment. The Court in *Carroll* did not explicitly ***800** address the scope of the search that is permissible. In this case, we consider the extent to which police officers-who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it-may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view. We hold that they may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant "particularly describing the place to be searched."[1]

I

In the evening of November 27, 1978, an informant who had previously proved to be reliable telephoned Detective Marcum of the District of Columbia Police Department and told him that an individual known as "Bandit" was selling narcotics kept in the trunk of a car parked at 439 Ridge Street. The informant stated that he had just observed "Bandit" complete a sale and that "Bandit" had told him that additional narcotics were in the trunk. The informant gave Marcum a detailed description of "Bandit" and stated that the car was a "purplish maroon" Chevrolet Malibu with District of Columbia license plates.

Accompanied by Detective Cassidy and Sergeant Gonzales, Marcum immediately drove to the area and found a maroon Malibu parked in front of 439 Ridge Street. A license check disclosed that the car was registered to Albert Ross; a computer check on Ross revealed that he fit the informant's description and used the alias "Bandit." In two passes through the neighborhood the officers did not observe anyone matching the informant's description. To avoid alerting persons on the street, they left the area.

***801** The officers returned five minutes later and observed the maroon Malibu turning off Ridge Street onto Fourth Street. They pulled alongside the Malibu, noticed that the driver matched the informant's description, and stopped the car. Marcum and Cassidy told the driver-later identified as Albert Ross, the respondent in this action-to get out of the vehicle. While they searched Ross, Sergeant Gonzales discovered a bullet on the car's front seat. He searched the interior of the car and found a pistol in the glove compartment. Ross then was arrested and handcuffed. Detective Cassidy took Ross' keys and opened the trunk, where he found a closed brown paper bag. He opened the bag and discovered a number of glassine bags containing a white powder. Cassidy replaced the bag, closed the trunk, and drove the car to headquarters.

At the police station Cassidy thoroughly searched the car. In addition to the "lunch-type" brown paper bag, Cassidy found in the trunk a zippered red leather pouch. He unzipped the pouch and discovered $3,200 in cash. The police laboratory later determined that the powder in the paper bag was heroin. No warrant was obtained.

Ross was charged with possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a). Prior to trial, he moved to suppress the heroin found in the paper bag and the currency found in the leather pouch. After an evidentiary hearing, the District Court denied the motion to suppress. The heroin and currency were introduced ****2161** in evidence at trial and Ross was convicted.

A three-judge panel of the Court of Appeals reversed the conviction. It held that the police had probable cause to stop and search Ross' car and that, under *Carroll v. United*

States, supra, and *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, the officers lawfully could search the automobile-including its trunk-without a warrant. The court considered separately, however, the warrantless search of the two containers found in the trunk. On the basis of ***802** *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235, the court concluded that the constitutionality of a warrantless search of a container found in an automobile depends on whether the owner possesses a reasonable expectation of privacy in its contents. Applying that test, the court held that the warrantless search of the paper bag was valid but the search of the leather pouch was not. The court remanded for a new trial at which the items taken from the paper bag, but not those from the leather pouch, could be admitted.[2]

The entire Court of Appeals then voted to rehear the case en banc. A majority of the court rejected the panel's conclusion that a distinction of constitutional significance existed between the two containers found in respondent's trunk; it held that the police should not have opened either container without first obtaining a warrant. The court reasoned:

"No specific, well-delineated exception called to our attention permits the police to dispense with a warrant to open and search 'unworthy' containers. Moreover, we believe that a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts. For these reasons, and because the Fourth Amendment protects all persons, not just those with the resources or fastidiousness to place their effects in containers that decision-makers would rank in the luggage line, we hold that the Fourth Amendment warrant requirement forbids the warrantless opening of a closed, opaque paper bag to the same extent that it forbids the warrantless opening of a small unlocked suitcase or a zippered leather pouch." 210 U.S.App.D.C. 342, 344, 655 F.2d 1159, 1161 (1981) (footnote omitted).

***803** The en banc Court of Appeals considered, and rejected, the argument that it was reasonable for the police to open both the paper bag and the leather pouch because they were entitled to conduct a warrantlesssearch of the entire vehicle in which the two containers were found. The majority concluded that this argument was foreclosed by *Sanders.*

Three dissenting judges interpreted *Sanders* differently.[3] Other courts also have read the *Sanders* opinion in different ways.[4] Moreover, disagreement concerning ****2162** the proper interpretation of *Sanders* was at least partially responsible for the fact that *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, was decided last Term without a Court opinion.

There is, however, no dispute among judges about the importance of striving for clarification in this area of the law. For countless vehicles are stopped on highways and public ***804** streets every day, and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle. In every such case a conflict is presented between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement. No single rule of law can resolve every conflict, but our conviction that clarification is feasible led us to grant the Government's petition for certiorari in this case and to invite the parties to address the question whether the decision in *Robbins* should be reconsidered. 454 U.S. 891, 102 S.Ct. 386, 70 L.Ed.2d 205.

II

We begin with a review of the decision in *Carroll* itself. In the fall of 1921, federal prohibition agents obtained evidence that George Carroll and John Kiro were "bootleggers" who frequently traveled between Grand Rapids and Detroit in an Oldsmobile Roadster.[5] On December 15, 1921, the agents unexpectedly encountered Carroll and Kiro driving west on that route in that car. The officers gave pursuit, stopped the roadster on the highway, and directed Carroll and Kiro to get out of the car.

No contraband was visible in the front seat of the Oldsmobile and the rear portion of the roadster was closed. One of the agents raised the rumble seat but found no liquor. He raised the seat cushion and again found nothing. The officer then struck at the "lazyback" of the seat and noticed that it was "harder than upholstery ordinarily is in those backs." ***805** 267 U.S., at 174, 45 S.Ct., at 292. He tore open the seat cushion and discovered 68 bottles of gin and whiskey concealed inside. No warrant had been obtained for the search.

Carroll and Kiro were convicted of transporting intoxicating liquor in violation of the National Prohibition Act. On review of those convictions, this Court ruled that the warrantless search of the roadster was reasonable within the meaning of

the Fourth Amendment. In an extensive opinion written by Chief Justice Taft, the Court held:

"On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Id.*, at 149, 45 S.Ct., at 283.

The Court explained at length the basis for this rule. The Court noted that historically warrantless searches of vessels, wagons, and carriages-as opposed to fixed premises such as a home or other building ****2163** -had been considered reasonable by Congress. After reviewing legislation enacted by Congress between 1789 and 1799,[6] the Court stated:

"Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between ***806** goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.*, at 151, 45 S.Ct., at 284. The Court reviewed additional legislation passed by Congress[7] and again noted that

"the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153, 45 S.Ct., at 285.

Thus, since its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods.[8] It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit ***807** substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable.[9]

****2164** In defining the nature of this "exception" to the general rule that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used," *id.*, at 156, 45 S.Ct., at 285, the Court in *Carroll* emphasized the importance of the requirement that ***808** officers have probable cause to believe that the vehicle contains contraband.

"Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 153-154, 45 S.Ct., at 285.

Moreover, the probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. " '[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgment of the court would make his faith reasonable.' " *Id.*, at 161-162, 45 S.Ct., at 288 (quoting *Director General of Railroads v. Kastenbaum*, 263 U.S. 25, 28, 44 S.Ct. 52, 53, 68 L.Ed. 146).[10]

***809** In short, the exception to the warrant requirement established in *Carroll* -the scope of which we consider in this case-applies only to searches of vehicles that are supported by probable cause.[11] In this class of cases, a search is not unreasonable if based on facts that would justify ****2165** the

issuance of a warrant, even though a warrant has not actually been obtained.[12]

III

The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance. That argument, ***810** however, was squarely rejected in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538.

Chadwick involved the warrantless search of a 200-pound footlocker secured with two padlocks. Federal railroad officials in San Diego became suspicious when they noticed that a brown footlocker loaded onto a train bound for Boston was unusually heavy and leaking talcum powder, a substance often used to mask the odor of marihuana. Narcotics agents met the train in Boston and a trained police dog signaled the presence of a controlled substance inside the footlocker. The agents did not seize the footlocker, however, at this time; they waited until respondent Chadwick arrived and the footlocker was placed in the trunk of Chadwick's automobile. Before the engine was started, the officers arrested Chadwick and his two companions. The agents then removed the footlocker to a secured place, opened it without a warrant, and discovered a large quantity of marihuana.

In a subsequent criminal proceeding, Chadwick claimed that the warrantless search of the footlocker violated the Fourth Amendment. In the District Court, the Government argued that as soon as the footlocker was placed in the automobile a warrantless search was permissible under *Carroll*. The District Court rejected that argument,[13] and the Government did not pursue it on appeal.[14] Rather, the Government contended in this Court that the warrant requirement of the Fourth Amendment applied only to searches of homes and ***811** other "core" areas of privacy. The Court unanimously rejected that contention.[15] Writing for the Court, THE CHIEF JUSTICE stated:

"[I]f there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless ****2166** searches were not a large issue in colonial America. Thus, silence in the historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search of respondents' footlocker. What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." 433 U.S., at 8-9, 97 S.Ct., at 2481-2482 (footnote omitted).

The Court in *Chadwick* specifically rejected the argument that the warrantless search was "reasonable" because a footlocker has some of the mobile characteristics that support warrantless searches of automobiles. The Court recognized that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile," *id.*, at 13, 97 S.Ct., at 2484, and noted that the practical problems associated with the temporary detention of a piece of luggage during the period of time necessary to obtain a warrant are significantly less than those associated with the detention of an automobile. *Id.*, at 13, n. 7, 97 S.Ct., at 2484, n.7. In ruling that the warrantless search of the ***812** footlocker was unjustified, the Court reaffirmed the general principle that closed packages and containers may not be searched without a warrant. Cf. *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877; *United States v. Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282. In sum, the Court in *Chadwick* declined to extend the rationale of the "automobile exception" to permit a warrantless search of any movable container found in a public place.[16]

The facts in *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235, were similar to those in *Chadwick*. In *Sanders*, a Little Rock police officer received information from a reliable informant that Sanders would arrive at the local airport on a specified flight that afternoon carrying a green suitcase containing marihuana. The officer went to the airport. Sanders arrived on schedule and retrieved a green suitcase from the airline baggage service. Sanders gave the suitcase to a waiting companion, who placed it in the trunk of a taxi. Sanders and his companion drove off in the cab; police officers followed and stopped the taxi several blocks from the airport. The officers opened the trunk, seized the suitcase, and searched it on the scene without a warrant. As predicted, the suitcase contained marihuana.

The Arkansas Supreme Court ruled that the warrantless search of the suitcase was impermissible under the Fourth

Amendment, and this Court affirmed. As in *Chadwick*, the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of *Carroll* applicable; the police had probable cause to seize the suitcase before it was placed in the trunk of the cab and did not ***813** have probable cause to search the taxi itself.[17] Since the suitcase had been placed in the trunk, no danger existed that its contents could have been secreted elsewhere ****2167** in the vehicle.[18] As THE CHIEF JUSTICE noted in his opinion concurring in the judgment:

"Because the police officers had probable cause to believe that respondent's green suitcase contained marihuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States v. Chadwick*, 433 U.S. 1 [97 S.Ct. 2476, 53 L.Ed.2d 538] (1977). ...
"... Here, as in *Chadwick*, it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick.* The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case. The Court need say no more." 442 U.S., at 766-767, 99 S.Ct., at 2594.

The Court in *Sanders* did not, however, rest its decision solely on the authority of *Chadwick.* In rejecting the State's ***814** argument that the warrantless search of the suitcase was justified on the ground that it had been taken from an automobile lawfully stopped on the street, the Court broadly suggested that a warrantless search of a container found in an automobile could never be sustained as part of a warrantless search of the automobile itself.[19] The Court did not suggest that it mattered whether probable cause existed to search the entire vehicle. It is clear, however, that in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter.

Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, however, was a case in which suspicion was not directed at a specific container. In that case the Court for the first time was forced to consider whether police officers who are entitled to conduct a warrantless search of an automobile stopped on a public roadway may open a container found within the vehicle. In the early morning of January 5, 1975, police officers stopped Robbins' station wagon because he was driving erratically. Robbins got out of the car, but later returned to obtain the vehicle's registration papers. When he opened the car door, the officers smelled marihuana smoke. One of the officers searched Robbins and discovered a vial of liquid; in a search of the interior of the car the officer found marihuana. The police officers then opened the tailgate of the station wagon and raised the cover of a recessed luggage compartment. In ***815** the compartment they found two packages wrapped in green opaque plastic. The police unwrapped the packages and discovered a large amount of marihuana in each.

Robbins was charged with various drug offenses and moved to suppress the contents of the plastic packages. The California Court of Appeal held that "[s]earch of the automobile was proper when the officers learned that appellant was smoking marijuana when they stopped him"[20] and ****2168** that the warrantless search of the packages was justified because "the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents." *People v. Robbins*, 103 Cal.App.3d 34, 40, 162 Cal.Rptr. 780, 783 (1980).

This Court reversed. Writing for a plurality, Justice Stewart rejected the argument that the outward appearance of the packages precluded Robbins from having a reasonable expectation of privacy in their contents. He also squarely rejected the argument that there is a constitutional distinction between searches of luggage and searches of "less worthy" containers. Justice Stewart reasoned that all containers are equally protected by the Fourth Amendment unless their contents are in plain view. The plurality concluded that the warrantless search was impermissible because *Chadwick* and *Sanders* had established that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." 453 U.S., at 425, 101 S.Ct., at 2845.

In an opinion concurring in the judgment, Justice Powell, the author of the Court's opinion in *Sanders*, stated that "[t]he plurality's approach strains the rationales of our prior cases and imposes substantial burdens on law enforcement without vindicating any significant values of privacy." 453 ***816** U.S., at 429, 101 S.Ct., at 2847.[21] He noted that possibly "the controlling question should be the scope of the automobile exception to the warrant requirement," *id.*, at 435, 101 S.Ct., at 2850, and explained that under that view

"when the police have probable cause to search an automobile, rather than only to search a particular container that fortuitously is located in it, the exigencies that allow the police to search the entire automobile without a warrant support the warrantless search of every container found therein. See *post*, at 451, and n. 13 [101 S.Ct., at 2859, and n.13] (STEVENS, J., dissenting). This analysis is entirely consistent with the holdings in *Chadwick* and *Sanders*, neither of which is an 'automobile case,' because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile." *Ibid.*

The parties in *Robbins* had not pressed that argument, however, ***817** and Justice POWELL concluded that institutional constraints made it inappropriate to reexamine basic doctrine without full adversary presentation. He concurred in the judgment, since it was supported-although not compelled-by the Court's opinion in *Sanders*, and stated that a future case might present a better opportunity for thorough consideration of the basic principles in this troubled area.

That case has arrived. Unlike *Chadwick* and *Sanders*, in this case police officers ****2169** had probable cause to search respondent's entire vehicle.[22] Unlike *Robbins*, in this case the parties have squarely addressed the question whether, in the course of a legitimate warrantless search of an automobile, police are entitled to open containers found within the vehicle. We now address that question. Its answer is determined by the scope of the search that is authorized by the exception to the warrant requirement set forth in*Carroll.*

IV

In *Carroll* itself, the whiskey that the prohibition agents seized was not in plain view. It was discovered only after an officer opened the rumble seat and tore open the upholstery of the lazyback. The Court did not find the scope of the search unreasonable. Having stopped Carroll and Kiro on a public road and subjected them to the indignity of a vehicle ***818** search-which the Court found to be a reasonable intrusion on their privacy because it was based on probable cause that their vehicle was transporting contraband-prohibition agents were entitled to tear open a portion of the roadster itself. The scope of the search was no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search. Since such a warrant could have authorized the agents to open the rear portion of the roadster and to rip the upholstery in their search for concealed whiskey, the search was constitutionally permissible.

In *Chambers v. Maroney* the police found weapons and stolen property "concealed in a compartment under the dashboard." 399 U.S., at 44, 90 S.Ct., at 1977. No suggestion was made that the scope of the search was impermissible. It would be illogical to assume that the outcome of *Chambers* -or the outcome of *Carroll* itself-would have been different if the police had found the secreted contraband enclosed within a secondary container and had opened that container without a warrant. If it was reasonable for prohibition agents to rip open the upholstery in *Carroll*, it certainly would have been reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it. A contrary rule could produce absurd results inconsistent with the decision in *Carroll* itself.

In its application of *Carroll*, this Court in fact has sustained warrantless searches of containers found during a lawful search of an automobile. In *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629, the Court upheld a warrantless seizure of whiskey found during a search of an automobile, some of which was discovered in "whiskey bags" that could have contained other goods.[23] In *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151, federal officers ***819** seized and searched packages of unstamped liquor found in the trunk of an automobile searched without a warrant. As described by a police officer who participated in the search: "I turned ****2170** the handle and opened the trunk and found the trunk completely filled with packages wrapped in brown paper, and tied with twine; I think somewhere around thirty packages, each one containing six bottles."[24] In these cases it was not contended that police officers needed a warrant to open the whiskey bags or to unwrap the brown paper packages. These decisions nevertheless "have much weight, as they show that this point neither occurred to the bar or the bench." *Bank of the United States v. Deveaux*, 5 Cranch 61, 88, 3 L.Ed. 38 (Marshall, C. J.). The fact that no such argument was even made illuminates the profession's understanding of the scope of the search permitted under *Carroll.* Indeed, prior to the decisions in *Chadwick* and *Sanders*, courts routinely had held that containers and packages found during a legitimate warrantless search of an automobile also could be searched without a warrant.[25]

***820** As we have stated, the decision in *Carroll* was based on the Court's appraisal of practical considerations viewed in the perspective of history. It is therefore significant that the practical consequences of the *Carroll* decision would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle. Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container.[26] The Court in *Carroll* held that "contraband goods *concealed* and illegally transported in an automobile or other vehicle may be searched for without a warrant." 267 U.S., at 153, 45 S.Ct., at 285 (emphasis added). As we noted in *Henry v. United States*, 361 U.S. 98, 104, 80 S.Ct. 168, 172, 4 L.Ed.2d 134, the decision in *Carroll* "merely relaxed the requirements for a warrant on grounds of practicability." It neither broadened nor limited the scope of a lawful search based on probable cause.

A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry ***821** or opening may ****2171** be required to complete the search.[27] Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.[28]

***822** This rule applies equally to all containers, as indeed we believe it must. One point on which the Court was in virtually unanimous agreement in *Robbins* was that a constitutional distinction between "worthy" and "unworthy" containers would be improper.[29] Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other,[30] the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion,[31] so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

****2172** As Justice Stewart stated in *Robbins*, the Fourth Amendment provides protection to the owner of every container ***823** that conceals its contents from plain view. 453 U.S., at 427, 101 S.Ct., at 2846 (plurality opinion). But the protection afforded by the Amendment varies in different settings. The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be. A container carried at the time of arrest often may be searched without a warrant and even without any specific suspicion concerning its contents. A container that may conceal the object of a search authorized by a warrant may be opened immediately; the individual's interest in privacy must give way to the magistrate's official determination of probable cause.

In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container. An individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened. These interests must yield to the authority of a search, however, which-in light of *Carroll* -does not itself require the prior approval of a magistrate. The scope of a warrantless search based on probable cause is no narrower-and no broader-than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.[32]

***824** The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in

the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

V

Our decision today is inconsistent with the disposition in *Robbins v. California* and with the portion of the opinion in *Arkansas v. Sanders* on which the plurality in *Robbins* relied. Nevertheless, the doctrine of *stare decisis* does not preclude this action. Although we have rejected some of the reasoning in *Sanders*, we adhere to our holding in that case; although we reject the precise holding in *Robbins*, there was no Court opinion supporting a single rationale for its judgment, and the reasoning we adopt today was not presented by the parties in that case. Moreover, it is clear that no legitimate reliance interest can be frustrated by our decision today.[33] Of greatest importance, we are convinced that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed ****2173** with substantial consistency throughout our history.

We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290:

***825** "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.' *Katz v. United States*, 389 U.S. 347, 357 [88 S.Ct. 507, 514, 19 L.Ed.2d 576] (footnotes omitted)."

The exception recognized in *Carroll* is unquestionably one that is "specifically established and well delineated." We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

The judgment of the Court of Appeals is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BLACKMUN, concurring.

My dissents in prior cases have indicated my continuing dissatisfaction and discomfort with the Court's vacillation in what is rightly described as "this troubled area." *Ante*, at 2168. See *United States v. Chadwick*, 433 U.S. 1, 17, 97 S.Ct. 2476, 2486, 53 L.Ed.2d 538 (1977); *Arkansas v. Sanders*, 442 U.S. 753, 768, 99 S.Ct. 2586, 2595, 61 L.Ed.2d 235 (1979); *Robbins v. California*, 453 U.S. 420, 436, 101 S.Ct. 2841, 2851, 69 L.Ed.2d 744 (1981).

I adhere to the views expressed in those dissents. It is important, however, not only for the Court as an institution, but also for law enforcement officials and defendants, that the applicable legal rules be clearly established. Justice STEVENS' opinion for the Court now accomplishes much in this respect, and it should clarify a good bit of the confusion that has existed. In order to have an authoritative ruling, I join the Court's opinion and judgment.

***826** Justice POWELL, concurring.

In my opinion in *Robbins v. California*, 453 U.S. 420, 429, 101 S.Ct. 2841, 2847, 69 L.Ed.2d 744 (1981), concurring in the judgment, I stated that the judgment was justified, though not compelled, by the Court's opinion in *Arkansas v. Sander*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). I did not agree, however, with the "bright line" rule articulated by the plurality opinion. Rather, I repeated the view I long have held that one's "reasonable expectation of privacy" is a particularly relevant factor in determining the validity of a warrantless search. I have recognized that, with respect to automobiles in general, this expectation can be only a limited one. See *Arkansas v. Sanders, supra*, at 761, 99 S.Ct., at 2591; *Almeida-Sanchez v. United States*, 413 U.S. 266, 279, 93 S.Ct. 2535, 2542, 37 L.Ed.2d 596 (1973) (POWELL, J., concurring). I continue to think that in many situations one's reasonable expectation of privacy may be a decisive factor in a search case.

It became evident last Term, however, from the five opinions written in *Robbins*-in none of which THE CHIEF JUSTICE joined-that it is essential to have a Court opinion in *automobile* search cases that provides "specific guidance to police and courts in this recurring situation." *Robbins v. California, supra*, at 435, 101 S.Ct., at 2850 (POWELL, J., concurring in judgment). The Court's opinion today, written by Justice STEVENS and now joined by THE CHIEF

JUSTICE and four other Justices, will afford this needed guidance. It is fair also to say that, given *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), and *Chambers* **2174 *v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), the Court's decision does not depart substantially from Fourth Amendment doctrine in automobile cases. Moreover, in enunciating a readily understood and applied rule, today's decision is consistent with the similar step taken last Term in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

I join the Court's opinion.

Justice WHITE, dissenting.

I would not overrule *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981). For the reasons stated by Justice Stewart in that *827 case, I would affirm the judgment of the Court of Appeals. I also agree with much of Justice MARSHALL's dissent in this case.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The majority today not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself. By equating a police officer's estimation of probable cause with a magistrate's, the Court utterly disregards the value of a neutral and detached magistrate. For as we recently, and unanimously, reaffirmed: "The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' " *Shadwick v. City of Tampa*, 407 U.S. 345, 350, 92 S.Ct. 2119, 2122, 32 L.Ed.2d 783 (1972), quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

A police officer on the beat hardly satisfies these standards. In adopting today's new rule, the majority opinion shows contempt for these Fourth Amendment values, ignores this Court's precedents, is internally inconsistent, and produces anomalous and unjust consequences. I therefore dissent.

I

According to the majority, whenever police have probable cause to believe that contraband may be found within an *828 automobile that they have stopped on the highway,[1] they may search not only the automobile but also any container found inside it, without obtaining a warrant. The scope of the search, we are told, is as broad as a magistrate could authorize in a warrant to search the automobile. The majority makes little attempt to justify this rule in terms of recognized Fourth Amendment values. The Court simply ignores the critical function that a magistrate serves. And although the Court purports to rely on the mobility of an automobile and the impracticability of obtaining a warrant, it never explains why these concerns permit the warrantless search of a *container*, which can easily be seized and immobilized while police are obtaining a warrant.

The new rule adopted by the Court today is completely incompatible with established Fourth Amendment principles, and takes a first step toward an unprecedented "probable cause" exception to the warrant requirement. In my view, under accepted standards, the warrantless search of the containers in this case clearly violates the Fourth Amendment.

**2175 A

"[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.' " *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978), quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). The warrant requirement is crucial to protecting Fourth Amendment rights because of the importance of having the probable-cause determination made in the first instance by a neutral and detached magistrate. Time and *829 again, we have emphasized that the warrant requirement provides a number of protections that a *post hoc* judicial evaluation of a policeman's probable cause does not.

The requirement of prior review by a detached and neutral magistrate limits the concentration of power held by executive officers over the individual, and prevents some overbroad or unjustified searches from occurring at all. See *United States v. United States District Court*, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972); *Abel v. United States*, 362 U.S. 217, 252, 80 S.Ct. 683, 703, 4 L.Ed.2d 668 (1960) (BRENNAN, J., joined by Warren, C.J., and Black and Douglas, JJ., dissenting). Prior review may also "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 565, 96 S.Ct. 3074, 3086, 49 L.Ed.2d 1116 (1976); see also *Beck v. Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964). Furthermore, even if a magistrate would have authorized the search that the police conducted, the interposition of a magistrate's neutral judgment reassures the public that the orderly process of law has been respected: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States, supra*, at 13-14, 68 S.Ct., at 368-369.

See also *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323, 98 S.Ct. 1816, 1825, 56 L.Ed.2d 305 (1978); *United States v. United States District Court, supra*, at 321, 92 S.Ct., at 2138. The safeguards embodied in the warrant requirement apply as forcefully to automobile searches as to any others.

Our cases do recognize a narrow exception to the warrant requirement for certain automobile searches. Throughout our decisions, two major considerations have been advanced to justify the automobile exception to the warrant requirement. ***830** We have upheld only those searches that are actually justified by those considerations.

First, these searches have been justified on the basis of the exigency of the mobility of the automobile. See, *e.g., Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This "mobility" rationale is something of a misnomer, cf. *Cady v. Dombrowski*, 413 U.S. 433, 442-443, 93 S.Ct. 2523, 2528-2529, 37 L.Ed.2d 706 (1973), since the police ordinarily can remove the car's occupants and secure the vehicle on the spot. However, the inherent mobility of the vehicle often creates situations in which the police's only alternative to an immediate search may be to release the automobile from their possession.[2] ****2176** This alternative creates an unacceptably high risk of losing the contents of the vehicle, and is a principal basis for the Court's automobile exception to the warrant requirement. See *Chambers, supra*, at 51, n. 9, 90 S.Ct., at 1981, n. 9.

In many cases, however, the police will, prior to searching the car, have cause to arrest the occupants and bring them to the station for booking. In this situation, the police can ordinarily seize the automobile and bring it to the station. Because the vehicle is now in the exclusive control of the authorities, any subsequent search cannot be justified by the mobility of the car. Rather, an immediate warrantless search of the vehicle is permitted because of the second major justification for the automobile exception: the diminished expectation of privacy in an automobile.

Because an automobile presents much of its contents in open view to police officers who legitimately stop it on a public way, is used for travel, and is subject to significant government ***831** regulation, this Court has determined that the intrusion of a warrantless search of an automobile is constitutionally less significant than a warrantless search of more private areas. See *Arkansas v. Sanders*, 442 U.S. 753, 761, 99 S.Ct. 2586, 2591, 61 L.Ed.2d 235 (1979) (collecting cases). This justification has been invoked for warrantless automobile searches in circumstances where the exigency of mobility was clearly not present. See, *e.g., South Dakota v. Opperman*, 428 U.S. 364, 367-368, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976); *Cady v. Dombrowski, supra*, at 441-442, 93 S.Ct., at 2528. By focusing on the defendant's reasonable expectation of privacy, this Court has refused to require a warrant in situations where the process of obtaining such a warrant would be more intrusive than the actual search itself. Cf. *Katz v. United States, supra*. A defendant may consider the seizure of the car a greater intrusion than an immediate search. See *Chambers, supra*, at 51-52, 90 S.Ct., at 1981. Therefore, even where police *can* bring both the defendant and the automobile to the station safely and can house the car while they seek a warrant, the police are permitted to decide whether instead to conduct an immediate search of the car. In effect, the warrantless search is permissible because a warrant requirement would not provide significant protection of the defendant's Fourth Amendment interests.

B

The majority's rule is flatly inconsistent with these established Fourth Amendment principles concerning the scope of the automobile exception and the importance of the warrant requirement. Historically, the automobile exception has been limited to those situations where its application is compelled by the justifications described above. Today, the majority makes no attempt to base its decision on these justifications. This failure is not surprising, since the traditional rationales for the automobile exception plainly do not support extending it to the search of a container found inside a vehicle.

***832** The practical mobility problem-deciding what to do with both the car and the occupants if an immediate search is not conducted-is simply not present in the case of movable containers, which can easily be seized and brought to the magistrate. See *Sanders*, 442 U.S., at 762-766, and nn. 10, 14, 99 S.Ct., at 2592-2594, and nn. 10, 14. The lesser-expectation-of-privacy rationale also has little force. A container, as opposed to the car itself, does not reflect diminished privacy interests. See *id.*, at 762, 764-765, 99 S.Ct., at 2592, 2593. Moreover, the practical corollary that this Court has recognized-that depriving occupants of the use of a car may be a greater intrusion than an immediate search-is of doubtful relevance here, since the owner of a container will rarely suffer significant inconvenience by being deprived of its use while a warrant is being obtained.

****2177** Ultimately, the majority, unable to rely on the justifications underlying the automobile exception, simply creates a new "probable cause" exception to the warrant requirement for automobiles. We have soundly rejected attempts to create such an exception in the past, see *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and we should do so again today.

In purported reliance on *Carroll v. United States, supra*, the Court defines the permissible scope of a search by reference to the scope of a probable-cause search that a magistrate could authorize. Under *Carroll*, however, the mobility of an automobile is what is critical to the legality of a warrantless search. Of course, *Carroll* properly confined the search to the probable-cause limits that would also limit a magistrate, but it did not suggest that the search could be as *broad* as a magistrate could authorize upon a warrant. A magistrate could authorize a search encompassing containers, even though the mobility rationale does not justify such a broad search. Indeed, the Court's reasoning might have justified the search of the entire car in *Coolidge* despite the fact that the car was not "mobile" at all. Thus, in blithely suggesting that *Carroll* "neither broadened nor limited the scope of a lawful search based on probable cause," ***833** *ante*, at 2170, the majority assumes what has never been the law: that the scope of the automobile-mobility exception to the warrant requirement is as broad as the scope of a "lawful" probable-cause search of an automobile, *i.e.*, one authorized by a magistrate.

The majority's sleight-of-hand ignores the obvious differences between the function served by a magistrate in making a determination of probable cause and the function of the automobile exception. It is irrelevant to a magistrate's function whether the items subject to search are mobile, may be in danger of destruction, or are impractical to store, or whether an immediate search would be less intrusive than a seizure without a warrant. A magistrate's only concern is whether there is probable cause to search them. Where suspicion has focused not on a particular item but only on a vehicle, home, or office, the magistrate might reasonably authorize a search of closed containers at the location as well. But an officer on the beat who searches an automobile without a warrant is not entitled to conduct a broader search than the exigency obviating the warrant justifies. After all, what justifies the warrantless search is not probable cause alone, but *probable cause coupled with the mobility of the automobile.* Because the scope of a *warrantless* search should depend on the scope of the justification for dispensing with a warrant, the entire premise of the majority's opinion fails to support its conclusion.

The majority's rule masks the startling assumption that a policeman's determination of probable cause is the functional equivalent of the determination of a neutral and detached magistrate. This assumption ignores a major premise of the warrant requirement-the importance of having a neutral and detached magistrate determine whether probable cause exists. See *supra*, at 2174-2175. The majority's explanation that the scope of the warrantless automobile search will be "limited" to what a magistrate could authorize is thus inconsistent with our cases, which firmly establish that an on-the-spot ***834** determination of probable cause is *never* the same as a decision by a neutral and detached magistrate.

C

Our recent decisions in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *Arkansas v. Sanders, supra*, and *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), clearly affirm that movable containers are different from automobiles for Fourth Amendment purposes. In *Chadwick*, the Court drew a constitutional distinction between luggage and automobiles in terms of substantial differences in expectations of ****2178** privacy. 433 U.S., at 12, 97 S.Ct., at 2484. Moreover, the Court held that the mobility of such containers does not justify dispensing with a warrant, since federal agents had seized the luggage and safely transferred it to their custody under their exclusive control. *Sanders* explicitly held that "the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U.S., at 766, 99 S.Ct., at 2594. And *Robbins* reaffirmed the *Sanders* rationale as applied to wrapped packages found in the unlocked luggage compartment of a vehicle. 453 U.S., at 425, 101 S.Ct., at 2845.[3]

In light of these considerations, I conclude that any movable container found within an automobile deserves precisely the same degree of Fourth Amendment warrant protection that it would deserve if found at a location outside the automobile. See *Sanders*, 442 U.S., at 763-765, and n. 13, 99 S.Ct., at 2592, 2593, and n. 13; *Chadwick*, *supra*, at 17, n. 1, 97 S.Ct., at 2486, n. 1 (BRENNAN, J., concurring). *Chadwick*, as the majority notes, "reaffirmed the general principle that closed packages and containers may not be ***835** searched without a warrant." *Ante*, at 2166. Although there is no need to describe the exact contours of that protection in this dissenting opinion, it is clear enough that closed, opaque containers-regardless of whether they are "worthy" or are always used to store personal items-are ordinarily fully protected. Cf. *Sanders, supra*, at 764, n. 13, 99 S.Ct., at 2593, n. 13.[4]

Here, because respondent Ross had placed the evidence in question in a closed paper bag, the container could be seized, but not searched, without a warrant. No practical exigencies required the warrantless searches on the street or at the station: Ross had been arrested and was in custody when both searches occurred, and the police succeeded in transporting the bag to the station without inadvertently spilling its contents.[5]

II

In announcing its new rule, the Court purports to rely on earlier automobile search cases, especially *Carroll v. United States*. The Court's approach, however, far from being "faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history," *ante*, at 2172, is plainly contrary to the letter and the spirit of our prior automobile search cases. Moreover, the new rule produces anomalous and unacceptable consequences.

***836** A

The majority's argument that its decision is supported by our decisions in *Carroll* and *Chambers* is misplaced. The Court in *Carroll* upheld a warrantless search of an automobile for contraband on the basis of the impracticability of securing a warrant in cases involving the transportation of contraband goods. The Court did not, however, suggest that obtaining a warrant for the search of an automobile is always impracticable. ****2179** [6] "In cases where the securing of a warrant is reasonably practicable, *it must be used*.... In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." 267 U.S., at 156, 45 S.Ct., at 286 (emphasis added).[7] As this Court reaffirmed in ***837** *Chambers*, 399 U.S., at 50, 90 S.Ct., at 1980, "[n]either *Carroll, supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."

Notwithstanding the reasoning of these cases, the majority argues that *Carroll* and *Chambers* support its decisions because integral compartments of a car are functionally equivalent to containers found within a car, and because the practical advantages to the police of the *Carroll* doctrine "would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle." *Ante*, at 2170. Neither of these arguments is persuasive. First, the Court's argument that allowing warrantless searches of certain integral compartments of the car in *Carroll* and *Chambers*, while protecting movable containers within the car, would be "illogical" and "absurd," *ante*, at 2169, ignores

the reason why this Court has allowed warrantless searches of automobile compartments. Surely an integral compartment within a car is just as mobile, and presents the same practical problems of safekeeping, as the car itself. This cannot be said of movable containers located within the car. The fact that there may be a high expectation of privacy in both containers and compartments is irrelevant, since the privacy rationale is not, and cannot be, the justification for the warrantless search of compartments.

The Court's second argument, which focuses on the practical advantages to police of the *Carroll* doctrine, fares no better. The practical considerations which concerned the *Carroll* Court involved the difficulty of immobilizing a vehicle while a warrant must be obtained. The Court had no occasion to address whether *containers* present the same practical difficulties as the car itself or integral compartments of the car. They do not. See *supra*, at 2176. *Carroll* hardly suggested, as the Court implies, *ante*, at 2170, that a warrantless ***838** search is justified simply because it assists police in obtaining more evidence.

Although it can find no support for its rule in this Court's precedents or in the traditional justifications for the automobile ****2180** exception, the majority offers another justification. In a footnote, the majority suggests that "practical considerations" militate against securing containers found during an automobile search and taking them to the magistrate. *Ante*, at 2171, n. 28. The Court confidently remarks: "Prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle." *Ibid.* The vehicle would have to be seized while a warrant was obtained, a requirement inconsistent with*Carroll* and *Chambers*. *Ante*, at 2171, n. 28.

This explanation is unpersuasive. As this Court explained in *Sanders* and as the majority today implicitly concedes, the burden to police departments of seizing a package or personal luggage simply does not compare to the burden of seizing and safeguarding automobiles. *Sanders*, 442 U.S., at 765, n. 14, 99 S.Ct., at 2593, n. 14; *ante*, at 2166, and n. 16. Other aspects of the Court's explanation are also implausible. The search will not always require a "combing" of the entire vehicle, since police may be looking for a particular item and may discover it promptly. If, instead, they are looking more generally for evidence of a crime, the immediate opening of the container will not protect the defendant's privacy; whether or not it contains contraband, the police will continue to search for new evidence. Finally, the defendant, not the police, should be afforded the choice whether he prefers the immediate opening of his suitcase or other container to the delay incident to seeking a warrant. Cf. *Sanders, supra*, at 764, n. 12, 99 S.Ct., at 2593, n. 12. The more ***839** presumption, if a presumption is to replace the defendant's consent, is surely that the immediate search of a closed container will be a greater invasion of the defendant's privacy interests than a mere temporary seizure of the container.[8]

B

Finally, the majority's new rule is theoretically unsound and will create anomalous and unwarranted results. These consequences are readily apparent from the Court's attempt to reconcile its new rule with the holdings of *Chadwick* and *Sanders*.[9] The Court suggests that probable cause to search only a container does not justify a warrantless search of an automobile in which it is placed, absent reason to believe that the contents could be secreted elsewhere in the vehicle. This, the majority asserts, is an indication that the new rule is carefully limited to its justification, and is not inconsistent with *Chadwick* and *Sanders*. But why is such a container more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the warrant ***840** requirement, than a container that police discover in a probable-cause search ****2181** of an entire automobile?[10] This rule plainly has peculiar and unworkable consequences: the Government "must show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located." 210 U.S.App.D.C. 342, 384, 655 F.2d 1159, 1201 (1981) (en banc) (Wilkey, J., dissenting).

Alternatively, the majority may be suggesting that *Chadwick* and *Sanders* may be explained because the connection of the container to the vehicle was incidental in these two cases. That is, because police had pre-existing probable cause to seize and search the containers, they were not entitled to wait until the item was placed in a vehicle to take advantage of the automobile exception. Cf. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564

(1971); 2 W. LaFave, Search and Seizure 519-525 (1978). I wholeheartedly agree that police cannot employ a pretext to escape Fourth Amendment prohibitions and cannot rely on an exigency that they could easily have avoided. This interpretation, however, might well be an exception that swallows up the majority's rule. In neither *Chadwick* nor *Sanders* did the Court suggest that the delay of the police was a pretext for taking advantage of the automobile exception. For all that appears, the Government may have had legitimate reasons for not searching as soon as they had probable cause. In any event, asking police to rely ***841** on such an uncertain line in distinguishing between legitimate and illegitimate searches for containers in automobiles hardly indicates that the majority's approach has brought clarification to this area of the law. *Ante*, at 2162; see *Robbins*, 453 U.S., at 435, 101 S.Ct., at 2850 (POWELL, J., concurring in judgment).[11]

III

The Court today ignores the clear distinction that *Chadwick* established between movable containers and automobiles. It also rejects all of the relevant reasoning of *Sanders*[12] and offers a substitute rationale that appears inconsistent with the result. See *supra*, at 2176. *Sanders* is therefore effectively overruled. And the Court unambiguously overrules "the disposition" of *Robbins, ante*, at 2172, though it gingerly avoids stating that it is overruling the case itself.

The only convincing explanation I discern for the majority's broad rule is expediency: it assists police in conducting ***842** automobile searches, ensuring that the private containers ****2182** into which criminal suspects often place goods will no longer be a Fourth Amendment shield. See *ante*, at 2170. "When a legitimate search is under way," the Court instructs us, "nice distinctions between ... glove compartments, upholstered seats, trunks, and wrapped packages ... must give way to the interest in the prompt and efficient completion of the task at hand." *Ante*, at 2170. No "nice distinctions" are necessary, however, to comprehend the well-recognized differences between movable containers (which, even after today's decision, would be subject to the warrant requirement if located outside an automobile), and the automobile itself, together with its integral parts. Nor can I pass by the majority's glib assertion that the "prompt and efficient completion of the task at hand" is paramount to the Fourth Amendment interests of our citizens. I had thought it well established that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S., at 393, 98 S.Ct., at 2413.[13]

This case will have profound implications for the privacy of citizens traveling in automobiles, as the Court well understands. "For countless vehicles are stopped on highways and public streets every day and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle." *Ante*, at 2161. A closed paper bag, a toolbox, a knapsack, a suitcase, and an attaché case can alike be searched without the protection of the judgment of a neutral magistrate, based only on the rarely disturbed decision of a police officer that he has probable cause to search for contraband in the vehicle.[14] The Court derives satisfaction from ***843** the fact that its rule does not exalt the rights of the wealthy over the rights of the poor. *Ante*, at 2171. A rule so broad that all citizens lose vital Fourth Amendment protection is no cause for celebration.

I dissent.

All Citations

456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 "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., Amdt. 4.

2 The court rejected the Government's argument that the warrantless search of the leather pouch was justified as incident to respondent's arrest. App. to Pet. for Cert. 137a. The Government has not challenged this holding.

3 Judge Tamm, the author of the original panel opinion, reiterated the view that *Sanders* prohibited the warrantless search of the leather pouch but not the search of the paper bag. Judge Robb agreed that this result was compelled by *Sanders*, although he stated that in his opinion "the right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room." 210 U.S.App.D.C., at 363, 655 F.2d, at 1180. Judge MacKinnon concurred with Judge Tamm that *Sanders* did not prohibit the warrantless search of the paper bag. Concerning the leather pouch, he agreed with Judge Wilkey, who dissented on the ground that *Sanders* should not be applied retroactively.

4 Many courts have held that *Sanders* requires that a warrant be obtained only for personal luggage and other "luggage-type" containers. See, *e.g., United States v. Brown*, 635 F.2d 1207 (CA6 1980); *United States v. Jimenez*, 626 F.2d 39 (CA7 1980). One court has held that *Sanders* does not apply if the police have probable cause to search an entire vehicle and not merely an isolated container within it. Cf. *State v. Bible*, 389 So.2d 42 (La.1980), vacated and remanded, 453 U.S. 918, 101 S.Ct. 3153, 69 L.Ed.2d 1001; *State v. Hernandez*, 408 So.2d 911 (La.1981); see also 210 U.S.App.D.C., at 363, 655 F.2d, at 1180 (Robb, J., dissenting).

5 On September 29, 1921, Carroll and Kiro met the agents in Grand Rapids and agreed to sell them three cases of whiskey. The sale was not consummated, however, possibly because Carroll learned the agents' true identity. In October, the agents discovered Carroll and Kiro driving the Oldsmobile Roadster on the road to Detroit, which was known as an active center for the introduction of illegal liquor into this country. The agents followed the roadster as far as East Lansing, but there abandoned the chase.

6 The legislation authorized customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it concealed goods subject to duty. The same legislation required a warrant for searches of dwelling places. 267 U.S., at 150-151, 45 S.Ct., at 284.

7 In particular, the Court noted an 1815 statute that permitted customs officers not only to board and search vessels without a warrant "but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law." *Id.*, at 151, 45 S.Ct., at 284.

8 In light of this established history, individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.

9 Subsequent cases make clear that the decision in *Carroll* was not based on the fact that the only course available to the police was an immediate search. As Justice Harlan later recognized, although a failure to *seize* a moving automobile believed to contain contraband might deprive officers of the illicit goods, once a vehicle itself has been stopped the exigency does not necessarily justify a warrantless *search. Chambers v. Maroney*, 399 U.S. 42, 62-64, 90 S.Ct. 1975, 1986-1987, 26 L.Ed.2d 419 (opinion of Harlan, J.). The Court in *Chambers*, however-with only Justice Harlan dissenting-refused to adopt a rule that would permit a warrantless seizure but prohibit a warrantless search. The Court held that if police officers have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct an immediate search of the contents of that vehicle. "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Id.*, at 52, 90 S.Ct., at 1981.

The Court also has held that if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded. *Chambers, supra; Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209. These decisions are based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests. Given the scope of the initial intrusion caused by a seizure of an automobile-which often could leave the occupants stranded on the highway-the Court rejected an inflexible rule that would force police officers in every case either to post guard at the vehicle while a warrant is obtained or to tow the vehicle itself to the station. Similarly, if an immediate search on the scene could be conducted,

but not one at the station if the vehicle is impounded, police often simply would search the vehicle on the street-at no advantage to the occupants, yet possibly at certain cost to the police. The rules as applied in particular cases may appear unsatisfactory. They reflect, however, a reasoned application of the more general rule that if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference.

10 After reviewing the relevant authorities at some length, the Court concluded that the probable-cause requirement was satisfied in the case before it. The Court held that "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." 267 U.S., at 162, 45 S.Ct., at 288. Cf. *Brinegar v. United States*, 338 U.S. 160, 176-177, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879; *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134.

11 See *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629; *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151; *Brinegar v. United States, supra*; *Henry v. United States, supra*; *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538; *Chambers v. Maroney, supra*; *Texas v. White, supra*; *Colorado v. Bannister*, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1.

Warrantless searches of automobiles have been upheld in a variety of factual contexts quite different from that presented in *Carroll.* Cf. *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730; *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706; *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000. Many of these searches do not require a showing of probable cause that the vehicle contains contraband. We are not called upon to-and do not-consider in this case the scope of the warrantless search that is permitted in those cases.

12 As the Court in *Carroll* concluded:

"We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the *Weeks* [*Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652] and *Amos* [*Amos v. United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654] cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them." 267 U.S., at 156, 45 S.Ct., at 286.

13 The District Court noted:

"In this case, there was no nexus between the search and the automobile, merely a coincidence. The challenged search in this case was one of a footlocker, not an automobile. The search took place not in an automobile, but in [the federal building]. The only connection that the automobile had to this search was that, prior to its seizure, the footlocker was placed on the floor of an automobile's open trunk." *United States v. Chadwick*, 393 F.Supp. 763, 772 (Mass.1975).

14 This Court specifically noted: "The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search, but it is argued that the rationale of our automobile search cases demonstrates the reasonableness of permitting warrantless searches of luggage; the Government views such luggage as analogous to motor vehicles for Fourth Amendment purposes." 433 U.S., at 11-12, 97 S.Ct., at 2483-2484.

15 See *id.*, at 17, 97 S.Ct., at 2486 (BLACKMUN, J., dissenting).

16 The Court concluded that there is a significant difference between the seizure of a sealed package and a subsequent search of its contents; the search of the container in that case was "a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker." *Id.*, 433 U.S., at 14, n. 8, 97 S.Ct., at 2485, n. 8. A temporary seizure of a package or piece of luggage often may be accomplished without as significant an intrusion upon the individual-and without as great a burden on the police-as in the case of the seizure of an automobile. See n. 9, *supra.*

17 The Arkansas Supreme Court carefully reviewed the facts of the case and concluded: "The information supplied to the police by the confidential informant is adequate to support the State's claim that the police had probable cause to believe that appellant's green suitcase contained a controlled substance when the police confiscated the suitcase and opened it." *Sanders v. State*, 262 Ark. 595, 599, 559 S.W.2d 704, 706 (1977). The court also noted: "The evidence in this case supports the conclusion that the relationship between the suitcase and the taxicab is coincidental." *Id.*, at 600, n. 2, 559 S.W.2d, at 706, n. 2.

18 Moreover, none of the practical difficulties associated with the detention of a vehicle on a public highway that made the immediate search in *Carroll* reasonable could justify an immediate search of the suitcase, since the officers had no interest in detaining the taxi or its driver.

19 The Court stated that "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." 442 U.S., at 764, n. 13, 99 S.Ct., at 2593, n. 13. This general rule was limited only by the observation that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." *Ibid.*

20 *People v. Robbins*, 103 Cal.App.3d 34, 39, 162 Cal.Rptr. 780, 782 (1980).

21 "While the plurality's blanket warrant requirement does not even purport to protect any privacy interest, it would impose substantial new burdens on law enforcement. Confronted with a cigar box or a Dixie cup in the course of a probable-cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values." 453 U.S., at 433-434, 101 S.Ct., at 2849-2850 (POWELL, J., concurring in judgment).

The substantial burdens on law enforcement identified by Justice POWELL would, of course, not be affected by the character of the container found during an automobile search. No comparable practical problems arise when the official suspicion is confined to a particular piece of luggage, as in *Chadwick* and *Sanders.* Cf. n. 19, *supra.*

22 The en banc Court of Appeals stated that "[b]ased on the tip the police received, Ross's car was properly stopped and searched, and the pouch and bag were properly seized." 210 U.S.App.D.C., at 361, 655 F.2d, at 1168 (footnote omitted). The court explained:

"[W]e believe it clear that the police had ample and reasonable cause to stop Ross and to search his car. The informer had supplied accurate information on prior occasions, and he was an eyewitness to sales of narcotics by Ross. He said he had just seen Ross take narcotics from the trunk of his car in making a sale and heard him say he possessed additional narcotics." *Id.*, at 361, n. 22, 655 F.2d, at 1168, n. 22.

The court further noted: "In this case, the informant told the police that Ross had narcotics in the trunk of his car. No specific container was identified." *Id.*, at 359, 655 F.2d, at 1166.

23 At the suppression hearing, defense counsel asked the police officer who had conducted the search: "Isn't it possible to put other goods in a bag that has the resemblance of a whiskey bag?" The officer responded: "I suppose it is. I did not think of that at that time. I knew it was whiskey, I was sure it was." App., O.T.1930, No. 477, p. 27.

24 App., O.T.1938, No. 49, p. 33. The brief of then Solicitor General Robert Jackson noted that the items searched "were wrapped in very heavy brown wrapping paper with at least two wrappings and with a heavy cord around them cross-wise so that they could readily be lifted." Brief for United States, O.T.1938, No. 49, p. 6.

25 See, *e.g., United States v. Soriano*, 497 F.2d 147, 149-150 (CA5 1974) (en banc); *United States v. Vento*, 533 F.2d 838, 867, n. 101 (CA3 1976); *United States v. Tramunti*, 513 F.2d 1087, 1104 (CA2 1975); *United States v. Issod*, 508 F.2d 990, 993 (CA7 1974); *United States v. Evans*, 481 F.2d 990, 994 (CA9 1973); *United States v. Bowman*, 487 F.2d 1229 (CA10 1973). Many courts continued to apply this rule following the decision in *Chadwick.* Cf. *United States v. Milhollan*, 599 F.2d 518, 526-527 (CA3 1979); *United States v. Gaultney*, 581 F.2d 1137, 1144-1145 (CA5 1978); *United States v. Finnegan*, 568 F.2d 637, 640-641 (CA9 1977). In ruling that police could search luggage and other containers found during a legitimate warrantless search of an automobile, courts often assumed that the "automobile exception" of *Carroll* applied whenever a container in an automobile was believed to contain contraband. That view, of course, has since been qualified by *Chadwick* and *Sanders.*

26 It is noteworthy that the early legislation on which the Court relied in *Carroll* concerned the enforcement of laws imposing duties on imported merchandise. See nn. 6 and 7, *supra.* Presumably such merchandise was shipped then in containers of various kinds, just as it is today. Since Congress had authorized warrantless searches of vessels and beasts for imported merchandise, it is inconceivable that it intended a customs officer to obtain a warrant for every package discovered during the search; certainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed. During virtually the entire history of our country-whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile-it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.

27 In describing the permissible scope of a search of a home pursuant to a warrant, Professor LaFave notes:

"Places within the described premises are not excluded merely because some additional act of entry or opening may be required. 'In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and similar items has been permitted.' " 2 W. LaFave, Search and Seizure 152 (1978) (quoting *Massey v. Commonwealth*, 305 S.W.2d 755, 756 (Ky.1957)).

28 The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed. Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle; thus in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained. Such a requirement would be directly inconsistent with the rationale supporting the decisions in *Carroll* and *Chambers.* Cf. nn. 19 and 22, *supra.*

29 Cf. 453 U.S., at 426-427, 101 S.Ct., at 2845-2846 (plurality opinion); *id.*, at 436, 101 S.Ct., at 2851 (BLACKMUN, J., dissenting); *id.*, at 443, 101 S.Ct., at 2854 (REHNQUIST, J., dissenting); *id.*, at 447, 101 S.Ct., at 2856 (STEVENS, J., dissenting).

30 If the distinction is based on the proposition that the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy, however, the propriety of a warrantless search necessarily would turn on much more than the fabric of the container. A paper bag stapled shut and marked "private" might be found to manifest a reasonable expectation of privacy, as could a cardboard box stacked on top of two pieces of heavy luggage. The propriety of the warrantless search seemingly would turn on an objective appraisal of all the surrounding circumstances.

31 " 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter-all his force dares not cross the threshold of the ruined tenement!' " *Miller v. United States*, 357 U.S. 301, 307, 78 S.Ct. 1190, 1194, 2 L.Ed.2d 1332 (quoting remarks attributed to William Pitt); cf. *Payton v. New York*, 445 U.S. 573, 601, n. 54, 100 S.Ct. 1371, 1388, n. 54, 63 L.Ed.2d 639.

32 In choosing to search without a warrant on their own assessment of probable cause, police officers of course lose the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the search was unconstitutional. Cf. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. Although an officer may establish that he acted in good faith in conducting the search by other evidence, a warrant issued by a magistrate normally suffices to establish it.

33 Any interest in maintaining the status quo that might be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedents clearly would not be legitimate.

1 The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars. Cf. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

2 The fact that the police are able initially to remove the occupants from the car does not remove the justification for an immediate search. If police could not conduct an immediate search of a stopped automobile, they would often be left with the difficult task of deciding what to do with the occupants while a warrant is obtained. In the case of a parked automobile, by contrast, if the automobile is unoccupied, this problem is not presented. See, *e.g., Coolidge v. New Hampshire, supra*.

3 The plurality stated: "[*Chadwick* and *Sanders*] made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." *Robbins v. California*, 453 U.S., at 425, 101 S.Ct., at 2845.

4 This rule may present some line-drawing problems, but no greater than those presented when a movable container is in the arms of a citizen walking down the street. There is no justification for relying on marginal difficulties of definition to reject a warrant requirement in one situation but not the other.

5 The Government argues that less secure containers such as paper bags can easily spill their contents; thus, no privacy interest of the defendant is protected if police are required to seize the container and bring it to the station. Whatever the force of this argument in other contexts, here police succeeded in reclosing the bag after the initial search and transporting it to the station without incident.

6 The Court in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), seems to have assumed that the police could not arrest the occupants of the automobile, since the offense was a misdemeanor and was not deemed to have been committed in the officers' presence. See 2 W. LaFave, Search and Seizure 511 (1978). Accordingly, police were faced with an exigency often not encountered today in searches of stopped automobiles: in order to *seize* the car pending the securing of a warrant, they would have to leave the occupants stranded.

7 In *Carroll*, of course, no movable *container* was searched. Although in other early cases containers may in fact have been searched, see *ante*, at 2169, the parties did not litigate in this Court the question whether containers deserve separate protection.

The Court's suggestion that the absence of such an argument "illuminates the profession's understanding of the scope of the search permitted under *Carroll,"ante*, at 2169, is an unusual approach to constitutional interpretation. I would hesitate to rely upon the "profession's understanding" of the Fourteenth Amendment or of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), in the early part of this century as justification for not granting Negroes constitutional protection. See *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Moreover, for a number of reasons, including the broad scope of the permitted search incident to arrest prior to *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and the uncertain meaning of a "search" prior to *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the profession formerly advanced different arguments against automobile searches than it advances today.

8 Seizures of automobiles can be distinguished because of the greater interest of defendants in continuing possession of their means of transportation; in the case of automobiles, a seizure is more likely to be a greater intrusion than an immediate search. See *Chambers v. Maroney*, 399 U.S. 42, 51-52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970).

9 Both cases would appear to fall within the majority's new rule. In *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), federal agents had probable cause to search a footlocker. Although the footlocker had been placed in the trunk of a car and the occupants were about to depart, the Court refused to rely on the automobile exception to uphold the search. (It is true that the United States did not argue in this Court that the search was justified pursuant to that exception, but the theory was hardly so novel that this Court could not have responsibly relied upon it.) In *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), too, the suitcase was mobile and police had probable cause to search it; it was carried in an automobile for several blocks before the automobile was stopped and the suitcase was seized and searched. Again, however, this Court invalidated the search.

10 In a footnote, the Court appears to suggest a more pragmatic rationale for distinguishing *Chadwick* and *Sanders*-that no practical problems comparable to those engendered by a general search of a vehicle would arise if the official suspicion is confined to a particular piece of luggage. *Ante*, at 2168, n. 21. This suggestion is illogical. A general search might disclose only a single item worth searching; conversely, pre-existing suspicion might attach to a number of items later placed in a car. Surely the protection of the warrant requirement cannot depend on a numerical count of the items subject to search.

11 Unless one of these alternative explanations is adopted, the Court's attempt to distinguish the holdings in *Chadwick* and *Sanders* is not only unpersuasive but appears to contradict the Court's own theory. The Court suggests that in each case, the connection of the container to the vehicle was simply coincidental, and notes that the police did not have probable cause to search the entire vehicle. But the police assuredly did have probable cause to search the vehicle *for the container.* The Court states that the scope of the permitted warrantless search is determined only by what a magistrate could authorize. *Ante*, at 2172. Once police found that container, according to the Court's own rule, they should have been entitled to search at least the container without a warrant. There was probable cause to search and the car was mobile in each case.

12 The Court suggests that it rejects "some of the reasoning in *Sanders.*" *Ante*, at 2172. But the Court in *Sanders* unambiguously stated: "[W]e hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U.S., at 766, 99 S.Ct., at 2594. The Court today instead adopts the reasoning of the opinion of THE CHIEF JUSTICE, joined by Justice STEVENS, who refused to join the majority opinion because of the breadth of its rationale. *Ibid.*

13 Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most "efficient" form of government?

14 The Court purports to restrict its rule to areas that the police have probable cause to search, as "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ante*, at 2172. I agree, of course, that the probable-cause component of the automobile exception must be strictly construed. I fear, however, that the restriction that the Court emphasizes may have little practical value. See 210 U.S.App.D.C. 342, 351, n. 21, 655 F.2d 1159, 1168, n. 21 (1981) (en banc). If police open a container within a car and find contraband, they may acquire probable cause to believe that other portions of the car, and other containers within it, will contain contraband. In practice, the Court's rule may amount to a wholesale authorization for police to search any car from top to bottom when they have suspicion, whether localized or general, that it contains contraband.

864 F.2d 837
United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America
v.
Ronald J. TARTAGLIA, Jr., Appellant.

No. 87–3079.
|
Argued May 5, 1988.
|
Decided Jan. 6, 1989.
|
As Amended Jan. 6, 1989.

Synopsis

Defendant was convicted before the United States District Court for the District of Columbia, John H. Pratt, J., of possession with intention to distribute cocaine, and he appealed. The Court of Appeals, Oberdorfer, District Judge, sitting by designation, held that: (1) there was probable cause for search of defendant's roomette on passenger train, and (2) warrantless search of train roomette was justified under exigent circumstances exception to the warrant requirement.

Affirmed.

***838 **16** Appeal from the United States District Court for the District of Columbia (Criminal No. 87–0101).

Attorneys and Law Firms

David N. Cicilline, Providence, R.I., was on the brief, for appellant.

Michael W. Farrell, Mary Ellen Abrecht, Betty Ann Soiefer, Washington, D.C., Oliver W. McDaniel, Asst. U.S. Attys., Jay B. Stephens, U.S. Atty., Washington, D.C., were on the brief, for appellee.

Before EDWARDS and WILLIAMS, Circuit Judges, and OBERDORFER,[*] District Judge.

Opinion

Opinion for the Court filed by District Judge OBERDORFER.

OBERDORFER, District Judge:

On February 24, 1987, defendant Ronald J. Tartaglia was arrested at Union Station in Washington, D.C. and subsequently indicted on a charge of possession with intent to distribute cocaine. A police detail had found and seized an incriminating quantity of cocaine when, without a warrant, they entered a roomette occupied by defendant in an Amtrak train's passenger car standing in Union Station. The train had stopped in Washington en route from Miami, Florida to New York City. The District Court denied defendant's motion to suppress the evidence so seized on the alternate grounds that (1) the warrantless search of defendant's roomette and knapsack was based upon probable cause stemming from police observations and the reaction of a well-trained, qualified narcotics detection dog while it sniffed at the door of the roomette; (2) the search could be regarded as a *Terry* stop based on reasonably suspicious circumstances arising from police scrutiny of a passenger list before the train departed from Miami; (3) an extension of the so-called "automobile exception" to the warrant requirement of the Fourth Amendment justified the warrantless search; and (4) the imminent departure of the train pending issuance of a warrant and the difficulty of delaying the train ***839 **17** were exigent circumstances which justified the warrantless search and seizure. The District Court not only found that there was probable cause to justify a search, but also specifically found that it was "practically impossible to get a warrant for a person on board a train which is only going to stop for 25 minutes." Transcript of Motion to Suppress held on May 21, 1987, ("Tr."), at 55a. Thereupon, defendant pled guilty pursuant to stipulation which allowed him to appeal the denial of his motion to suppress. After sentence, defendant appealed. Appellant argues here that the trial court erred in relying on the "exigent circumstances exception" and on the "automobile exception" to excuse the warrant requirement of the Fourth Amendment. We affirm because we are satisfied that the record here portrays exigent circumstances that fully justify the District Court's denial of the motion to suppress.

I.

The investigation leading to the search, seizure, and arrest evolved incrementally. Amtrak officials, aware of the use of Amtrak facilities by drug couriers travelling from South Florida to drug sources in the Northeast corridor markets, have created a Drug Interdiction Unit. Experience with detection of drug couriers who use Amtrak service has

established characteristics of those couriers: "[u]nusual nervousness, travelling from a source city, paying cash for a ticket, unusual itinerary, associating with a known drug trafficker, making a call to a pay phone upon deplaning, travelling under a false name, giving a false call-back number." Tr. at 42–43.

William Pearson is an inspector with the Amtrak Police Department in charge of the Drug Interdiction Unit in Washington, D.C. He came to Amtrak in 1986 after 26 years of service in the Dade County (Florida) Police Department, 18 of those years in various drug enforcement investigative assignments. Tr. at 21. Beginning in 1980, he worked in a transportation unit with the mission of interdicting the movement of drugs by plane, train, and bus from South Florida. He had learned from that experience that train "compartments were the means of choice" for drug couriers on that route. Tr. at 22. On February 23, 1987, Pearson examined the manifest, or passenger list, of Amtrak Train 98, then en route from Miami to New York, focusing on the information about passengers travelling in compartments. The name of B. Johnson occupying roomette 3 on Train 98 caught Pearson's eye. Train 98 was due to arrive at Union Station in Washington, D.C. at 6:45 A.M. on February 24. The manifest indicated a telephone number for Johnson (401–232–8040) and also indicated that he had paid cash for a one-way ticket from Miami to Providence, Rhode Island. Pearson called that number to learn whether it was a "working number." Tr. at 23. The Providence police, on inquiry, reported that the number had been out of service for some time. Tr. at 24. This information led Pearson to attempt to interview B. Johnson when Train 98 arrived at Union Station and to notify members of the Drug Enforcement Agency. Pearson requested and received the assistance of Detective Michael C. Bernier and his narcotics detector dog.

In 1982, the dog handler, Detective Bernier, had received four months of training in the management of a particular dog, Max 25. The dog was trained to react to the presence of certain narcotics. The handler was trained to control the dog and to recognize reactions of the dog to the presence of those narcotics. By February 24, 1987, the two had worked together on numerous occasions. They had been credited with accurately detecting 52 deposits of narcotics. On only two occasions, Bernier had noted a reaction suggesting that the dog had detected narcotics which did not lead to a measurable deposit. Bernier had frequently testified about searches conducted with the aid of the dog in this and other area courts. Tr. at 6–7.

At 6:30 A.M., February 24, 1987, Pearson, Bernier and two other investigators met at Union Station. Train 98 arrived on schedule and the several officers with Max 25 boarded it. Train 98 was scheduled to remain in Union Station for 25 minutes while its engine was changed from diesel to electric. At stations between Washington ***840 **18** and New York no stop was scheduled for longer than three minutes.

Pearson, Bernier leading Max 25, and another Metropolitan Police Officer entered the car in which B. Johnson was reported to occupy roomette 3. Max 25 walked down the corridor of the car sniffing at the vents situated just above floor level of each roomette. According to Bernier, when Max 25 reached roomette 3, he "started scratching on the door and then he backed off and starting [sic] whining as if wanting to get in the room...." Tr. at 9. Bernier notified Pearson of a "narcotics alert". Pearson then took over. The door of roomette 3 was closed. Pearson approached the door and knocked on it, while Bernier, who had left Max 25 under the control of another officer, stood in the corridor. Tr. at 15. A voice from inside asked something like, "Who is it?" Pearson responded, "Amtrak." A male opened the door, at which time Pearson identified himself by his badge and credentials, saying further, "Police Officer, can I talk to you for a minute?" The male responded, "No." Tr. at 27. However, when Pearson asked for the passenger's ticket, he produced a one-way ticket to Providence issued to "B. Johnson." On further inquiry defendant identified himself as B. Johnson. He was not able to produce any identification. When asked if he would consent to a search, he replied, "Well, I'm not sure." Tr. at 28. In response to still further inquiry, he said that he had flown to Florida. Pearson indicated that during this colloquy he stood outside the roomette while the man who claimed to be B. Johnson sat, partially dressed, on the roomette bed and "appeared over-nervous," his "eyes darting in a nervous manner, around the compartment." Tr. at 28. Eventually, Pearson told the suspect about the positive alert by the trained drug detection dog that indicated the presence of a controlled substance in his compartment. Pearson said that based on that alert he was going to search the compartment. He asked the, by then, suspect to get dressed and step out of the compartment while the search was being conducted. The suspect complied without saying anything that Pearson could recall. Pearson then searched the compartment and found under the roomette bed a knapsack which had no locks on it, but was tightly closed with little straps. Tr. at 31. He opened the knapsack. Inside the knapsack he found a towel. Inside the towel he found a wrapped package with a bandaid over

one portion of it. Pulling the bandaid away, Pearson saw a white crystalized powder which he believed to be cocaine. Later, chemical analysis established that the substance was indeed cocaine—500 grams. Pearson advised Bernier that he had found a deposit of narcotics and that Bernier should place defendant under arrest. This he did. There followed the instant indictment and defendant's motion to suppress the use of the seized cocaine as evidence.

II.

When examining a claim of exigent circumstances, we review the District Court's legal conclusions under a *de novo* standard, but review its factual findings under a clearly erroneous standard. *United States v. Socey,* 846 F.2d 1439, 1445 (D.C.Cir.1988). Because the facts in this case are not in dispute, we focus on the district court's legal conclusions.

The presence of exigent circumstances necessitating an immediate search is one of the "few specially established and well-delineated exceptions" to the rule that warrantless searches are *per se* unreasonable. *United States v. McClinnhan,* 660 F.2d 500, 503 (D.C.Cir.1981) (quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)). The Supreme Court has recognized that the likelihood of destruction of evidence creates exigent circumstances that can excuse the need for a search warrant. *Schmerber v. California,* 384 U.S. 757, 770–71, 86 S.Ct. 1826, 1835–36, 16 L.Ed.2d 908 (1966). When probable cause has been established and there is danger that evidence will be removed or destroyed before a warrant can be obtained, a warrantless search and seizure can be justified. *See United States v. Johnson,* 802 F.2d 1459, 1462 (D.C.Cir.1986); ***841 **19** *United States v. McEachin,* 670 F.2d 1139, 1144 (D.C.Cir.1981); *United States v. Allison,* 639 F.2d 792, 794 (D.C.Cir.1980).

The Supreme Court has also long recognized that, given probable cause, the ready mobility of a vehicle can justify an exigency exception to the warrant requirement of the Fourth Amendment. The circumstances created by the possibility of quick flight, in an automobile, for example, and the resultant removal of evidence from police access before a warrant can be brought to bear have been found sufficiently exigent to support the exception. *California v. Carney,* 471 U.S. 386, 390, 105 S.Ct. 2066, 2068–69, 85 L.Ed.2d 406 (1985) (citing *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925)); *United States v. Caroline,* 791 F.2d 197 (D.C.Cir.1986). This "automobile exception" takes into account that

> the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Carroll, supra, 267 U.S. at 153, 45 S.Ct. at 285; *accord Carney, supra,* 471 U.S. at 390, 105 S.Ct. at 2068–69.

Appellant would distinguish these automobile precedents on the theory that the suspect here aboard a train, unlike the driver of a motor vehicle, was not in control of it. Brief for Appellant at 8. However, we agree with the observation of the Court of Appeals for the Fourth Circuit in a related context that where "[a roomette passenger on a moving train] had no ability to direct the train's movement, its continuing journey imposed practical constraints on the officers' ability to mount a full-fledged investigation within jurisdictional boundaries." *United States v. Whitehead,* 849 F.2d 849, 854 (4th Cir.1988). The same dynamics apply to a suspect in a roomette on a train stopping for a few minutes to change engines before proceeding out of the jurisdiction.

Appellant further argues that he had a heightened expectation of privacy in his train roomette. This issue was addressed in *United States v. Liberto,* 660 F.Supp. 889 (D.D.C.1987), *aff'd,* 838 F.2d 571 (D.C.Cir.1988), where this court affirmed a District Court decision that, because of pervasive government regulation of passenger railroad travel, a passenger travelling in a train roomette has a lesser expectation of privacy than a person in his home. The *Liberto* court upheld a warrantless search of a train roomette where the police had probable cause to believe that the roomette contained illicit drugs and where the train had stopped at Union Station for a short period of time, making it unlikely that the police could have obtained a warrant before the train departed. This precedent is dispositive of the privacy issue raised here.

Viewing this case with reference to the "totality of the factual circumstances," the District Court correctly found that the circumstances here created probable cause for Pearson to believe that defendant's roomette contained illicit drugs. *See United States v. Socey,* 846 F.2d 1439, 1446 (D.C.Cir.1988) (relying on *Illinois v. Gates,* 462 U.S. 213, 238, 103

S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)). This finding is amply supported by the record of the unfolding events that culminated in the search. Inspector Pearson examined the train manifest and noticed that "B. Johnson" had reserved a compartment on Train 98, then en route from Miami, Florida to New York, and had paid cash for a one-way ticket from Miami to Providence, Rhode Island. Pearson called the "call-back number" listed for B. Johnson and learned that it had been out of service for some time. Upon entering the train while it stopped in Union Station the next day, Detective Bernier led Max 25 down the corridor outside roomette 3, the compartment assigned to B. Johnson, and Max 25 indicated a "narcotics alert" at the vent of the door to that roomette. B. Johnson, later identified as Mr. Tartaglia, ***842 **20** appeared "over-nervous" as he was being subsequently questioned by Pearson, and he was unable to produce any identification. Moreover, appellant does not claim that there was not probable cause sufficient to support a warrant. Brief of Appellant at 12. In any event, there is ample evidence in the record to support the conclusion that there was probable cause. The totality of these circumstances gave Pearson probable cause to believe that the roomette contained illicit drugs, *see United States v. Liberto, supra,* and entitled him to a search warrant, if there had been sufficient time to secure one. *See United States v. Fulero,* 498 F.2d 748 (D.C.Cir.1974).

There being probable cause to conduct a search, the critical question becomes whether, "guided by the 'realities of the situation presented by the record,' " *McEachin, supra,* 670 F.2d at 1144 (quoting *United States v. Robinson,* 533 F.2d 578, 581 (D.C.Cir.1975) (*en banc*), *cert. denied,* 424 U.S. 956, 96 S.Ct. 1432, 47 L.Ed.2d 362 (1976)), there was a "reasonable likelihood that the item *would be moved* before a warrant could be obtained." *United States v. Martin,* 562 F.2d 673, 678 (D.C.Cir.1977). The District Court found that "exigent circumstances made it practically impossible to get a warrant for a person on board a train which was only going to stop for 25 minutes." Tr. at 55a. Noting that "[t]he amount of time necessary to obtain a warrant by traditional means has always been considered in determining whether circumstances are exigent," this court has recognized that the exigencies of a situation might preclude even the shortest possible delay involved in obtaining a telephonic warrant. *McEachin, supra,* 670 F.2d at 1146. In this case, Pearson entered the roomette and discovered the drugs within five minutes after he and his team boarded Train 98. He could have walked to a telephone in five minutes to seek a telephonic search warrant. It was not unreasonable, however, for the police or the District Court to conclude that no warrant could have been at hand and a search completed in the fraction of 25 minutes remaining before the train's scheduled departure. Moreover, the D.C. warrant would have been of no force and effect after the train had travelled the short distance from Union Station to the Maryland line. The train and the suspect would have been beyond the reach of any D.C. warrant almost as soon as the train pulled out of Union Station.

The rationale of the Court of Appeals for the Ninth Circuit in *United States v. Johnston,* 497 F.2d 397 (9th Cir.1974) is helpful here. That case involved a search of a suspect's suitcase located on an Amtrak train due to leave the San Diego station within moments. Having found that there was probable cause to believe the suspect was carrying marijuana, the *Johnston* court concluded that the circumstances were sufficiently exigent to justify an exception to the warrant requirement. That court stated that

> the agent was not required to assume that Defendant would stay on the train with the marijuana in the suitcases all the way to New York City. The agent could properly have believed that Defendant would depart with the suitcases at some stop along the way. Indeed, the agent could properly have believed that Defendant might well discharge one or both suitcases at some intermediate point to an accomplice in the criminal enterprise.

Id. at 398–99. Here, after its stop in Union Station, Amtrak Train 98 was scheduled to stop several times before it reached New York City, for no longer than a three minute delay at each station. Tr. at 25–26. It would not have been unreasonable for Pearson to believe that defendant would leave the train at any of the next several stops and that he would take the suspected narcotics with him. Theoretically, Pearson could have asked a train official to hold the train in Union station. But the train had a capacity for 600–800 passengers who would have been inconvenienced by the delay. Tr. at 34. Delaying the train could also have disrupted the movement of passenger and freight traffic moving and scheduled to move north and south in the heavily travelled eastern corridor, with attendant commercial and safety risks. Tr. at 32–34. ***843 **21** These factors weigh heavily in favor of a procedure that might be impermissible in their absence.

Because the police did not have sufficient time to procure a warrant before train 98 left Union Station and because there was more than a reasonable likelihood that the train, and therefore the roomette and its contents, would be moved before a warrant could be obtained, the warrantless search of defendant's roomette was justified under the exigent circumstances exception to the warrant requirement of the

Fourth Amendment. In reaching this conclusion, we have not overlooked defendant's contention that the police could have seized the luggage in roomette 3 and then sought to obtain a warrant to search the knapsack. However, the detector dog indicated the narcotics alert at the vent of the door to roomette 3 and was then withdrawn. Tr. at 9–10. Because the police here had probable cause to believe that the suspected narcotics were located inside roomette 3, without any indication as to where in the roomette, (Tr. at 44), it was not unreasonable for them to search the roomette and its contents, including luggage, to discover the narcotics or to discover that narcotics were not there before the train was due to leave. It is established that a legitimate search of an automobile may extend to any container that could hold the object of the search. *United States v. Ross,* 456 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982); *United States v. Caroline, supra,* 791 F.2d at 202. This principle easily extends to the search of a knapsack in a train roomette that was entered without a warrant but with probable cause in the exigent circumstances here.

Since we affirm the District Court's ruling on the basis of exigent circumstances, it is unnecessary to reach its alternate grounds for its decision.

III.

In view of the foregoing, the decision of the District Court is

AFFIRMED.

All Citations

864 F.2d 837, 275 U.S.App.D.C. 15

Footnotes

* Of the United States District Court for the District of Columbia sitting by designation pursuant to 28 U.S.C. § 292(a).

119 S.Ct. 1297
Supreme Court of the United States

WYOMING, Petitioner,

v.

Sandra HOUGHTON.

No. 98-184.
|
Argued Jan. 12, 1999.
|
Decided April 5, 1999.

Synopsis

Defendant was convicted in the District Court, Natrona County, Wyoming, Dan Spangler, J., of felony possession of a controlled substance, and she appealed. The Wyoming Supreme Court, 956 P.2d 363, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Scalia, held that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search.

Reversed.

Justice Breyer filed a concurring opinion.

Justice Stevens, with whom Justice Souter and Justice Ginsburg joined, filed a dissenting opinion.

****1298** *Syllabus*[*]

During a routine traffic stop, a Wyoming Highway Patrol officer noticed a hypodermic syringe in the driver's shirt pocket, which the driver admitted using to take drugs. The officer then searched the passenger compartment for contraband, removing and searching what respondent, a passenger in the car, claimed was her purse. He found drug paraphernalia there and arrested respondent on drug charges. The trial court denied her motion to suppress all evidence from the purse as the fruit of an unlawful search, holding that the officer had probable cause to search the car for contraband, and, by extension, any containers therein that could hold such contraband. Respondent was convicted. In reversing, the Wyoming Supreme Court ruled that an officer with probable cause to search a vehicle may search all containers that might conceal the object of the search; but, if the officer knows or should know that a container belongs to a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal contraband within it to avoid detection. Applying that rule here, the court concluded that the search violated the Fourth and Fourteenth Amendments.

Held: Police officers with probable cause to search a car, as in this case, may inspect passengers' belongings found in the car that are capable of concealing the object of the search. In determining whether a particular governmental action violates the Fourth Amendment, this Court inquires first whether the action was regarded as an unlawful search or seizure under common law when the Amendment was framed, see, *e.g., Wilson v. Arkansas,* 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976. Where that inquiry yields no answer, the Court must evaluate the search or seizure under traditional reasonableness standards by balancing an individual's privacy interests against legitimate governmental interests, see, *e.g., Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 652-653, 115 S.Ct. 2386, 132 L.Ed.2d 564. This Court has concluded that the Framers would have regarded as reasonable the warrantless search of a car that police had probable cause to believe contained contraband, *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, as well as the warrantless search of containers *within* the automobile, *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572. Neither *Ross* nor the historical evidence it relied upon admits of a distinction based on ownership. The analytical principle underlying *Ross* ' s rule is also fully consistent with the balance of this ***296** Court's Fourth Amendment jurisprudence. Even if the historical evidence were equivocal, the balancing of the relative interests weighs decidedly in favor of searching a passenger's belongings. Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars. See, *e.g., Cardwell v. Lewis,* 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325. The degree of intrusiveness of a package search upon personal privacy and personal dignity is substantially less than the degree of intrusiveness of the body searches at issue in *United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210, and *Ybarra v. Illinois,* 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238. In contrast to the passenger's reduced privacy expectations, the governmental interest in effective law enforcement would be appreciably impaired without the ability to search the passenger's belongings, since an automobile's ready mobility creates the risk that evidence

or contraband will be permanently lost while a warrant is obtained, *California v. Carney,* 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406; **1299 since a passenger may have an interest in concealing evidence of wrongdoing in a common enterprise with the driver, cf. *Maryland v. Wilson,* 519 U.S. 408, 413-414, 117 S.Ct. 882, 137 L.Ed.2d 41; and since a criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car, see, *e.g., Rawlings v. Kentucky,* 448 U.S. 98, 102, 100 S.Ct. 2556, 65 L.Ed.2d 633. The Wyoming Supreme Court's "passenger property" rule would be unworkable in practice. Finally, an exception from the historical practice described in *Ross* protecting only a passenger's property, rather than property belonging to *anyone* other than the driver, would be less sensible than the rule that a package may be searched, whether or not its owner is present as a passenger or otherwise, because it might contain the object of the search. Pp. 1300-1304.

956 P.2d 363, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, THOMAS, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post,* p. 1304. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post,* p. 1304.

Attorneys and Law Firms

Paul S. Rehurek, Cheyenne, WY, for petitioner.

Barbara B. McDowell, for United States as amicus curiae by leave of the Court.

*297 Donna D. Domonkos, Cheyenne, WY, for respondent.

Opinion

Justice SCALIA delivered the opinion of the Court.

This case presents the question whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband.

I

In the early morning hours of July 23, 1995, a Wyoming Highway Patrol officer stopped an automobile for speeding and driving with a faulty brake light. There were three *298 passengers in the front seat of the car: David Young (the driver), his girlfriend, and respondent. While questioning Young, the officer noticed a hypodermic syringe in Young's shirt pocket. He left the occupants under the supervision of two backup officers as he went to get gloves from his patrol car. Upon his return, he instructed Young to step out of the car and place the syringe on the hood. The officer then asked Young why he had a syringe; with refreshing candor, Young replied that he used it to take drugs.

At this point, the backup officers ordered the two female passengers out of the car and asked them for identification. Respondent falsely identified herself as "Sandra James" and stated that she did not have any identification. Meanwhile, in light of Young's admission, the officer searched the passenger compartment of the car for contraband. On the back seat, he found a purse, which respondent claimed as hers. He removed from the purse a wallet containing respondent's driver's license, identifying her properly as Sandra K. Houghton. When the officer asked her why she had lied about her name, she replied: "In case things went bad."

Continuing his search of the purse, the officer found a brown pouch and a black wallet-type container. Respondent denied that the former was hers, and claimed ignorance of how it came to be there; it was found to contain drug paraphernalia and a syringe with 60 ccs of methamphetamine. Respondent admitted ownership of the black container, which was also found to contain drug paraphernalia, and a syringe (which respondent acknowledged was hers) with 10 ccs of methamphetamine-an amount insufficient to support the felony conviction at issue in this case. The officer also found fresh needle-track marks on respondent's arms. He placed her under arrest.

The State of Wyoming charged respondent with felony possession of methamphetamine **1300 in a liquid amount greater than three-tenths of a gram. See Wyo. Stat. Ann. § 35-7-1031(c)(iii) (Supp.1996). After a hearing, the trial court denied *299 her motion to suppress all evidence obtained from the purse as the fruit of a violation of the Fourth and Fourteenth Amendments. The court held that the officer had probable cause to search the car for contraband, and, by extension, any containers therein that could hold such contraband. A jury convicted respondent as charged.

The Wyoming Supreme Court, by divided vote, reversed the conviction and announced the following rule:

> "Generally, once probable cause is established to search a vehicle, an officer is entitled to search all containers therein which may contain the object of the search. However, if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection." 956 P.2d 363, 372 (1998).

The court held that the search of respondent's purse violated the Fourth and Fourteenth Amendments because the officer "knew or should have known that the purse did not belong to the driver, but to one of the passengers," and because "there was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse." *Ibid.* We granted certiorari, 524 U.S. 983, 119 S.Ct. 31, 141 L.Ed.2d 791 (1998).

II

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. See *Wilson v. Arkansas,* 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); *California v. Hodari D.,* 499 U.S. 621, 624, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Where that inquiry yields no answer, we must ***300** evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. See, *e.g., Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 652-653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

It is uncontested in the present case that the police officers had probable cause to believe there were illegal drugs in the car. *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), similarly involved the warrantless search of a car that law enforcement officials had probable cause to believe contained contraband-in that case, bootleg liquor. The Court concluded that the Framers would have regarded such a search as reasonable in light of legislation enacted by Congress from 1789 through 1799-as well as subsequent legislation from the founding era and beyond-that empowered customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to a duty. *Id.,* at 150-153, 45 S.Ct. 280. See also *United States v. Ross,* 456 U.S. 798, 806, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *Boyd v. United States,* 116 U.S. 616, 623-624, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Thus, the Court held that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant" where probable cause exists. *Carroll, supra,* at 153, 45 S.Ct. 280.

We have furthermore read the historical evidence to show that the Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers *within* an automobile. In *Ross, supra,* we upheld as reasonable the warrantless search of a paper bag and leather pouch found in the trunk of the defendant's car by officers who had probable cause to believe that the trunk contained drugs. Justice STEVENS, writing for the Court, observed:

> "It is noteworthy that the early legislation on which the Court relied in *Carroll* concerned the enforcement of laws imposing duties on imported merchandise.... ****1301** Presumably such merchandise was shipped then in containers ***301** of various kinds, just as it is today. Since Congress had authorized warrantless searches of vessels and beasts for imported merchandise, it is inconceivable that it intended a customs officer to obtain a warrant for every package discovered during the search; certainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed. During virtually the entire history of our country-whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile-it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *Id.,* at 820, n. 26, 102 S.Ct. 2157.

Ross summarized its holding as follows: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of *every part of the vehicle and its contents* that may conceal the object of the search." *Id.,* at 825, 102 S.Ct. 2157 (emphasis added). And our later cases describing *Ross* have characterized it as applying broadly to *all* containers within a car, without qualification as to ownership. See, *e.g., California v. Acevedo,* 500 U.S. 565, 572, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) ("[T]his Court in *Ross* took the

critical step of saying that closed containers in cars could be searched without a warrant because of their presence within the automobile"); *United States v. Johns,* 469 U.S. 478, 479-480, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) (*Ross* "held that if police officers have probable cause to search a lawfully stopped vehicle, they may conduct a warrantless search of any containers found inside that may conceal the object of the search").

To be sure, there was no passenger in *Ross,* and it was not claimed that the package in the trunk belonged to anyone other than the driver. Even so, if the rule of law that *Ross* announced were limited to contents belonging to the driver, or contents other than those belonging to passengers, one would have expected that substantial limitation to be expressed. ***302** And, more importantly, one would have expected that limitation to be apparent in the historical evidence that formed the basis for *Ross'* s holding. In fact, however, nothing in the statutes *Ross* relied upon, or in the practice under those statutes, would except from authorized warrantless search packages belonging to passengers on the suspect ship, horse-drawn carriage, or automobile.

Finally, we must observe that the analytical principle underlying the rule announced in *Ross* is fully consistent-as respondent's proposal is not-with the balance of our Fourth Amendment jurisprudence. *Ross* concluded from the historical evidence that the permissible scope of a warrantless car search "is defined by the object of the search and the places in which there is probable cause to believe that it may be found." 456 U.S., at 824, 102 S.Ct. 2157. The same principle is reflected in an earlier case involving the constitutionality of a search warrant directed at premises belonging to one who is not suspected of any crime: " The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily,* 436 U.S. 547, 556, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978). This statement was illustrated by citation and description of *Carroll,* 267 U.S., at 158-159, 167, 45 S.Ct. 280. 436 U.S., at 556-557, 98 S.Ct. 1970.

In sum, neither *Ross* itself nor the historical evidence it relied upon admits of a distinction among packages or containers based on ownership. When there is probable cause to search for contraband in a car, it is reasonable for police officers-like customs officials in the founding era-to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are "in" the car, and the officer has probable cause to search for contraband *in* the car.

****1302** ***303** Even if the historical evidence, as described by *Ross,* were thought to be equivocal, we would find that the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger's belongings. Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which "trave[l] public thoroughfares," *Cardwell v. Lewis,* 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), "seldom serv[e] as ... the repository of personal effects," *ibid.,* are subjected to police stop and examination to enforce "pervasive" governmental controls "[a]s an everyday occurrence," *South Dakota v. Opperman,* 428 U.S. 364, 368, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny.

In this regard-the degree of intrusiveness upon personal privacy and indeed even personal dignity-the two cases the Wyoming Supreme Court found dispositive differ substantially from the package search at issue here. *United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), held that probable cause to search a car did not justify a body search of a passenger. And *Ybarra v. Illinois,* 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), held that a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons. These cases turned on the unique, significantly heightened protection afforded against searches of one's person. "Even a limited search of the outer clothing ... constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry v. Ohio,* 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Such traumatic consequences are not to be expected when the police examine an item of personal property found in a car.[1]

***304** Whereas the passenger's privacy expectations are, as we have described, considerably diminished, the governmental interests at stake are substantial. Effective law enforcement would be appreciably impaired without the ability to search a passenger's personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car. As in all car-search cases, the "ready mobility" of an automobile creates a risk that

the evidence or contraband will be permanently lost while a warrant is obtained. *California v. Carney,* 471 U.S. 386, 390, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). In addition, a car passenger-unlike the unwitting tavern patron in *Ybarra*-will often be engaged in a common enterprise with the driver, and have the same interest in ***305** concealing the fruits or the evidence of their wrongdoing. Cf. *Maryland* ****1303** *v. Wilson,* 519 U.S. 408, 413-414, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). A criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car, see, *e.g., Rawlings v. Kentucky,* 448 U.S. 98, 102, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980)-perhaps even surreptitiously, without the passenger's knowledge or permission. (This last possibility provided the basis for respondent's defense at trial; she testified that most of the seized contraband must have been placed in her purse by her traveling companions at one or another of various times, including the time she was "half asleep" in the car.)

To be sure, these factors favoring a search will not always be present, but the balancing of interests must be conducted with an eye to the generality of cases. To require that the investigating officer have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly permission, is to impose requirements so seldom met that a "passenger's property" rule would dramatically reduce the ability to find and seize contraband and evidence of crime. Of course these requirements would not attach (under the Wyoming Supreme Court's rule) until the police officer knows or has reason to know that the container belongs to a passenger. But once a "passenger's property" exception to car searches became widely known, one would expect passenger-confederates to claim everything as their own. And one would anticipate a bog of litigation-in the form of both civil lawsuits and motions to suppress in criminal trials-involving such questions as whether the officer should have believed a passenger's claim of ownership, whether he should have inferred ownership from various objective factors, whether he had probable cause to believe that the passenger was a confederate, or to believe that the driver might have introduced the contraband ***306** into the package with or without the passenger's knowledge.[2] When balancing the competing interests, our determinations of "reasonableness" under the Fourth Amendment must take account of these practical realities. We think they militate in favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak.

Finally, if we were to invent an exception from the historical practice that *Ross* accurately described and summarized, it is perplexing why that exception should protect only property belonging to a passenger, rather than (what seems much more logical) property belonging to *anyone* other than the driver. Surely Houghton's privacy would have been invaded to the same degree whether she was present or absent when her purse was searched. And surely her presence in the car with the driver provided more, rather than less, reason to believe that the two were in league. It may ordinarily be easier to identify the property as belonging to someone other than the driver when the purported owner is present to identify it-but in the many cases (like *Ross* itself) where the car is seized, that identification may occur later, at the station ***307** house; and even at the site of the stop one can readily imagine a package clearly marked with the owner's name and phone number, by which the officer can confirm the driver's denial of ownership. The sensible rule (and the one supported ****1304** by history and case law) is that such a package may be searched, whether or not its owner is present as a passenger or otherwise, because it may contain the contraband that the officer has reason to believe is in the car.

* * *

We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search. The judgment of the Wyoming Supreme Court is reversed.

It is so ordered.

Justice BREYER, concurring.

I join the Court's opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question. *Ante,* at 1300. I also agree with the Court that when a police officer has probable cause to search a car, say, for drugs, it is reasonable for that officer also to search containers within the car. If the police must establish a container's ownership prior to the search of that container (whenever, for example, a passenger says "that's mine"), the resulting uncertainty will destroy the workability of the bright-line rule set forth in *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). At the same time, police officers with probable cause to search

a car for drugs would often have probable cause to search containers regardless. Hence a bright-line rule will authorize only a limited number of searches that the law would not otherwise justify.

At the same time, I would point out certain limitations upon the scope of the bright-line rule that the Court describes. ***308** Obviously, the rule applies only to automobile searches. Equally obviously, the rule applies only to containers found within automobiles. And it does not extend to the search of a person found in that automobile. As the Court notes, and as *United States v. Di Re,* 332 U.S. 581, 586-587, 68 S.Ct. 222, 92 L.Ed. 210 (1948), relied on heavily by Justice STEVENS' dissent, makes clear, the search of a person, including even " 'a limited search of the outer clothing,' " *ante,* at 1302 (quoting *Terry v. Ohio,* 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)), is a very different matter in respect to which the law provides "significantly heightened protection." *Ibid.;* cf. *Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); *Sibron v. New York,* 392 U.S. 40, 62-64, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

Less obviously, but in my view also important, is the fact that the container here at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it. Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both. However, given this Court's prior cases, I cannot argue that the fact that the container was a purse *automatically* makes a legal difference, for the Court has warned against trying to make that kind of distinction. *United States v. Ross, supra,* at 822, 102 S.Ct. 2157. But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of "outer clothing," *Terry v. Ohio, supra,* at 24, 88 S.Ct. 1868, which under the Court's cases would properly receive increased protection. See *post,* at 1306 (STEVENS, J., dissenting) (quoting *United States v. Di Re, supra,* at 587, 68 S.Ct. 222). In this case, the purse was separate from the person, and no one has claimed that, under those circumstances, the type of container makes a difference. For that reason, I join the Court's opinion.

***309** Justice STEVENS, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

After Wyoming's highest court decided that a state highway patrolman unlawfully searched Sandra Houghton's purse, the State of Wyoming petitioned for a writ of certiorari. The State asked that we consider the propriety of searching an automobile *passenger's* ****1305** belongings when the government has developed probable cause to search the vehicle for contraband based on the *driver's* conduct. The State conceded that the trooper who searched Houghton's purse lacked a warrant, consent, or "probable cause specific to the purse or passenger." Pet. for Cert. i. In light of our established preference for warrants and individualized suspicion, I would respect the result reached by the Wyoming Supreme Court and affirm its judgment.

In all of our prior cases applying the automobile exception to the Fourth Amendment's warrant requirement, either the defendant was the operator of the vehicle and in custody of the object of the search, or no question was raised as to the defendant's ownership or custody.[1] In the only automobile case confronting the search of a passenger defendant-*United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948)-the Court held that the exception to the warrant requirement did not apply. *Id.,* at 583-587, 68 S.Ct. 222 (addressing searches of the passenger's pockets and the space between his shirt and underwear, both of which uncovered counterfeit fuel rations). In *Di Re,* as here, the information prompting the search directly implicated the driver, not the passenger. Today, instead of adhering to the settled distinction between drivers and passengers, the Court fashions a new rule that is based on a distinction between property contained in clothing worn by ***310** a passenger and property contained in a passenger's briefcase or purse. In cases on both sides of the Court's newly minted test, the property is in a "container" (whether a pocket or a pouch) located in the vehicle. Moreover, unlike the Court, I think it quite plain that the search of a passenger's purse or briefcase involves an intrusion on privacy that may be just as serious as was the intrusion in *Di Re.* See, *e.g., New Jersey v. T.L.O.,* 469 U.S. 325, 339, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985); *Ex parte Jackson,* 96 U.S. 727, 733, 24 L.Ed. 877 (1878).

Even apart from *Di Re,* the Court's rights-restrictive approach is not dictated by precedent. For example, in *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), we were concerned with the interest of the driver in the

integrity of "his automobile," *id.,* at 823, 102 S.Ct. 2157, and we categorically rejected the notion that the scope of a warrantless search of a vehicle might be "defined by the nature of the container in which the contraband is secreted," *id.,* at 824, 102 S.Ct. 2157. "Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ibid.* We thus disapproved of a possible container-based distinction between a man's pocket and a woman's pocketbook. Ironically, while we concluded in *Ross* that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab," *ibid.,* the rule the Court fashions would apparently permit a warrantless search of a passenger's briefcase if there is probable cause to believe the taxidriver had a syringe somewhere in his vehicle.

Nor am I persuaded that the mere spatial association between a passenger and a driver provides an acceptable basis for presuming that they are partners in crime or for ignoring privacy interests in a purse.[2] Whether ****1306** or not the Fourth ***311** Amendment required a warrant to search Houghton's purse, cf. *Carroll v. United States,* 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543 (1925), at the very least the trooper in this case had to have probable cause to believe that her purse contained contraband. The Wyoming Supreme Court concluded that he did not. 956 P.2d 363, 372 (1998); see App. 20-21.

Finally, in my view, the State's legitimate interest in effective law enforcement does not outweigh the privacy concerns at issue.[3] I am as confident in a police officer's ability to apply a rule requiring a warrant or individualized probable cause to search belongings that are-as in this case-obviously owned by and in the custody of a passenger as is the Court in a "passenger-confederate[']s" ability to circumvent the rule. *Ante,* at 1303. Certainly the ostensible clarity of the Court's rule is attractive. But that virtue is insufficient justification for its adoption. ***312** *Arizona v. Hicks,* 480 U.S. 321, 329, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987); *Mincey v. Arizona,* 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Moreover, a rule requiring a warrant or individualized probable cause to search passenger belongings is every bit as simple as the Court's rule; it simply protects more privacy.

I would decide this case in accord with what we *have* said about passengers and privacy, rather than what we *might have* said in cases where the issue was not squarely presented. See *ante,* at 1301. What Justice Jackson wrote for the Court 50 years ago is just as sound today:

> "The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?
>
> "We see no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Di Re,* 332 U.S., at 587, 68 S.Ct. 222.

Accord, *Ross,* 456 U.S., at 823, 825, 102 S.Ct. 2157 (the proper scope of a warrantless automobile search based on probable cause is "no broader" than the proper scope of a search authorized ***313** by a warrant supported by probable cause).[4] Instead of applying ordinary ****1307** Fourth Amendment principles to this case, the majority extends the automobile warrant exception to allow searches of passenger belongings based on the driver's misconduct. Thankfully, the Court's automobile-centered analysis limits the scope of its holding. But it does not justify the outcome in this case.

I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The dissent begins its analysis, *post,* at 1304 (opinion of STEVENS, J.), with an assertion that this case is governed by our decision in *United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), which held, as the dissent describes it, that the automobile exception to the warrant requirement did not justify "searches of the passenger's pockets and the space between his shirt and underwear," *post,* at 1305. It attributes that holding to "the settled distinction between drivers and passengers," rather than to a distinction between search of the person and search of property, which the dissent claims is "newly minted" by today's opinion-a "new rule that is based on a distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse." *Ibid.*

In its peroration, however, the dissent quotes extensively from Justice Jackson's opinion in *Di Re,* which makes it very clear that it is *precisely* this distinction between search of the person and search of property that the case relied upon:

"The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car." 332 U.S., at 587, 68 S.Ct. 222 (quoted *post,* at 1306).

Does the dissent really believe that Justice Jackson was saying that a house search could not inspect *property* belonging to persons found in the house-say a large standing safe or violin case belonging to the owner's visiting godfather? Of course that is not what Justice Jackson meant at all. He was referring *precisely* to that "distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse" that the dissent disparages, *post,* at 1305. This distinction between searches of the person and searches of property is assuredly *not* "newly minted," see *post,* at 1305. And if the dissent thinks "pockets" and "clothing" do not count as part of the person, it must believe that the only searches of the person are strip searches.

2 The dissent is "confident in a police officer's ability to apply a rule requiring a warrant or individualized probable cause to search belongings that are ... obviously owned by and in the custody of a passenger," *post,* at 1306. If this is the dissent's strange criterion for warrant protection ("*obviously* owned by and in the custody of") its preceding paean to the importance of preserving passengers' privacy rings a little hollow on rehearing. Should it not be enough if the passenger *says* he owns the briefcase, and the officer has no concrete reason to believe otherwise? Or would the dissent consider *that* an example of "obvious" ownership? On reflection, it seems not at all obvious precisely what constitutes obviousness-and so even the dissent's on-the-cheap protection of passengers' privacy interest in their property turns out to be unclear, and hence unadministrable. But maybe the dissent does not mean to propose an obviously-owned-by-and-in-the-custody-of test after all, since a few sentences later it endorses, *simpliciter,* "a rule requiring a warrant or individualized probable cause to search passenger belongings," *ibid.* For the reasons described in text, that will not work.

1 See, *e.g., California v. Acevedo,* 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991); *California v. Carney,* 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985); *United States v. Johns,* 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985); *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); 3 W. LaFave, Search and Seizure § 7.2(c), pp. 487-488, and n. 113 (3d ed.1996); *id.,* § 7.2(d), at 506, n. 167.

2 See *United States v. Di Re,* 332 U.S. 581, 587, 68 S.Ct. 222, 92 L.Ed. 210 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled"); *Chandler v. Miller,* 520 U.S. 305, 308, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (emphasizing individualized suspicion); *Ybarra v. Illinois,* 444 U.S. 85, 91, 94-96, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (explaining that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person," and discussing *Di Re*); *Brown v. Texas,* 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *Sibron v. New York,* 392 U.S. 40, 62-63, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); see also *United States v. Padilla,* 508 U.S. 77, 82, 113 S.Ct. 1936, 123 L.Ed.2d 635 (1993) *(per curiam)* ("Expectations of privacy and property interests

govern the analysis of Fourth Amendment search and seizure claims. Participants in a criminal conspiracy may have such expectations or interests, but the conspiracy itself neither adds to nor detracts from them").

3 To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law "yields no answer." *Ante,* at 1300. Neither the precedent cited by the Court, nor the majority's opinion in this case, mandate that approach. In a later discussion, the Court does attempt to address the contemporary privacy and governmental interests at issue in cases of this nature. *Ante,* at 1302-1303. Either the majority is unconvinced by its own recitation of the historical materials, or it has determined that considering additional factors is appropriate in any event. The Court does not admit the former; and of course the latter, standing alone, would not establish uncertainty in the common law as the prerequisite to looking beyond history in Fourth Amendment cases.

4 In response to this dissent the Court has crafted an imaginative footnote suggesting that the *Di Re* decision rested, not on Di Re's status as a mere occupant of the vehicle and the importance of individualized suspicion, but rather on the intrusive character of the search. See *ante,* at 1302, n. 1. That the search of a safe or violin case would be less intrusive than a strip search does not, however, persuade me that the *Di Re* case would have been decided differently if Di Re had been a woman and the gas coupons had been found in her purse. Significantly, in commenting on the *Carroll* case immediately preceding the paragraphs that I have quoted in the text, the *Di Re* Court stated: "But even the National Prohibition Act did not direct the arrest of all occupants but only of the person in charge of the offending vehicle, though there is better reason to assume that no passenger in a car loaded with liquor would remain innocent of knowledge of the car's cargo than to assume that a passenger must know what pieces of paper are carried in the pockets of the driver." *United States v. Di Re,* 332 U.S., at 586-587, 68 S.Ct. 222.

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