Loyola of Los Angeles Law Review

Volume 2 | Number 1 Article 11

4-1-1969

Limiting the Warrantless Search: People v. Marshall

Richard Ross

LIMITING THE WARRANTLESS SEARCH: *PEOPLE v. MARSHALL*[1]

In a social climate wherein politicians link votes to "law and order" proclamations, how shrill will be the voice of the Fourth Amendment? Frequently the layman, unsophisticated in constitutional principles and safeguards, fails to comprehend why a defendant should be released when his substantive guilt is not in dispute. The answer is that a rigid adherence to criminal procedure is necessary to secure our continued liberties.

The Fourth Amendment[2] provides that a search should be conducted under the authority of a search warrant supported by probable cause. But it expressly prohibits only *unreasonable* searches, thereby impliedly authorizing the incidental search. The courts have sanctioned the incidental search under exigent circumstances. The arrest, however, must be valid at the inception. The fruits of the search cannot retrospectively furnish probable cause for arrest.[3] Notwithstanding the well-defined maxim, courts often experience difficulty in determining whether the incidental search has in fact been valid. Not only is the police officer acting pursuant to an instant judgment, but also the facts and impressions in a given case may not lend themselves to explicit analysis.

The adoption of the exclusionary rule, which denies the admission of illegally obtained evidence,[4] should have increased the use of search warrants. Alarmingly, in the period from 1931 through 1961, the Los Angeles County Municipal Court issued only 538 search warrants. In the same period 500,000 felony criminal prosecutions originated in the court.[5] Available nationwide studies also demonstrate continuing inertia regarding the issuance of search warrants.[6]

---

1 69 Cal. 2d —, 442 P.2d 665, 69 Cal. Rptr. 585 (1968).

2 U.S. CONST. amend. IV:

> 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.

3 Weeks v. United States, 232 U.S. 383 (1914); People v. Haven, 59 Cal. 2d 713, 381 P.2d 927, 31 Cal. Rptr. 47 (1963).

4 Mapp v. Ohio, 367 U.S. 643 (1961); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

5 Wood, *We Should Make Greater Use of Search Warrants,* CALIFORNIA PEACE OFFICER, May-June, 1962, at 27.

6 L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, DETECTION OF CRIME 100 (1967). This volume is the first in a series that will treat the administration of criminal justice. The series is being developed by the American Bar Foundation. *See also* Note, *Philadelphia Police Practice and the Law of Arrest,* 100 U. PA. L. REV. 1182 (1952); Com-

People v. Marshall[7] has carved limitations into the expediency of the warrantless search in California. A review of that decision should aid in determining the impact *Marshall* might have on the warrantless arrest.

Defendant Marshall was convicted of possession of marijuana.[8] Police officers had dispatched an informant to Marshall's apartment to purchase marijuana. The informant procured the marijuana and delivered it to the officers, who were waiting in the street. Testimony indicated that the cannabis emitted a distinct sweet odor. Thereafter the officers decided to arrest Marshall, although they had neither an arrest warrant nor a search warrant. They discussed the possibility of obtaining a search warrant, but dismissed it as impracticable on a Sunday night. When no one responded to their knock, a police locksmith picked the lock to gain entry. A cursory check disclosed that no one was present, but one of the officers detected a sweet odor similar to that which emanated from the package they had obtained from the informant. The odor was traced to an open bedroom closet. Wine-soaked marijuana was found in plastic bags within a brown paper bag contained in an open cardboard box. Upon Marshall's return home, four hours later, he was arrested.

The court held that the officers had lawfully gained entry into the empty apartment pursuant to Penal Code section 844.[9] The question arose whether a search is valid when it precedes the arrest by four hours. Also at issue was whether the Fourth Amendment will permit their seizing contraband without a search warrant when the contraband is not in plain sight.

The courts have encountered manifest difficulties in seeking to determine the length and depth of search or, indeed, whether any search may be conducted prior to an arrest. Recent California and federal decisions have not settled the dilemma.

In 1948 the United States Supreme Court held, in *Trupiano v. United States*,[10] that where it was practicable to obtain a search warrant, one should be obtained. The seizure of an illicit distillery was held to be unreasonable, since it was not done in conformity with the Fourth Amendment. In 1950 *Trupiano* was overruled by *United States v. Rabinowitz*,[11] which declared a search and seizure reasonable if incident to a valid arrest.

---

ment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

7 69 Cal. 2d —, 442 P.2d 665, 69 Cal. Rptr. 585 (1968).

8 CAL. HEALTH & SAFETY CODE § 11530 (West 1964).

9 CAL. PEN. CODE § 844 (West 1956):

To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

10 334 U.S. 699 (1948).

11 339 U.S. 56 (1950).

The Court said a search warrant was not the sole determinant of the reasonableness of a search.[12]

What does "incidental to a lawful arrest" mean? It is here that we tread the murky abyss. The Supreme Court has said the search must be "contemporaneous"[13] or "substantially contemporaneous"[14] with the arrest, but it has not yet had to dispose of this question in a difficult fact situation.

The lower federal courts have been seeking to determine whether contraband seized prior to an arrest is admissible evidence. They are able to distinguish each case on its facts, although it is difficult to predict the outcome in advance. Cases abound where the court declares the seizure unreasonable, holding that the search was not incidental to the arrest but rather that the arrest was incidental to the search.[15]

On the other hand, some courts have based their decisions on whether the search and arrest have constituted one continuous transaction.[16] By way of proliferating the labyrinth, the Seventh Circuit recently ruled that it is permissible for the search to precede the formal arrest where the search and arrest are nearly simultaneous and essentially constitute but one transaction. "To hold differently would be to allow a technical formality of time to control where there has been no real interference with the substantive rights of defendant."[17]

California has adopted both the "substantially contemporaneous" doctrine[18] and the "one continuous transaction" doctrine.[19] In contradistinction to the federal courts, California has repeatedly held that a legal search may occur prior to an arrest if the officers have probable cause to arrest the individual whose premises are being searched.[20]

The seizure has been upheld in cases where the defendant was found in another part of town,[21] and also where the officers entered, seized evidence, and awaited defendant's return.[22] In *People v. Williams*[23] defendant was convicted of robbery and burglary. The police, as in the

12 *Id.* at 65. It is interesting to note that only twice before had the court acted so quickly in formally reversing itself. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 108 (1966).

13 Agnello v. United States, 269 U.S. 20 (1925).

14 Stoner v. California, 376 U.S. 483 (1964).

15 Lee v. United States, 232 F.2d 354 (D.C. Cir. 1956); United States v. Royster, 204 F. Supp. 760 (N.D. Ohio 1961).

16 Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967).

17 Holt v. Simpson, 340 F.2d 853, 856 (7th Cir. 1965).

18 People v. Doherty, 67 Cal. 2d 9, 429 P.2d 177, 59 Cal. Rptr. 857 (1967).

19 People v. Acosta, 213 Cal. App. 2d 706, 29 Cal. Rptr. 241 (1963).

20 Willson v. Superior Court, 46 Cal. 2d 291, 294 P.2d 36 (1956); People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955); People v. Cockrell, 63 Cal. 2d 659, 408 P.2d 116, 47 Cal. Rptr. 788 (1965).

21 People v. Vice, 147 Cal. App. 2d 269, 305 P.2d 270 (1956).

22 People v. Luna, 155 Cal. App. 2d 493, 318 P.2d 116 (1957).

23 189 Cal. App. 2d 29, 11 Cal. Rptr. 43 (1961).

instant case, had probable cause to make an arrest, entered defendant's room in his absence, and discovered evidence which was used at the trial. Defendant was not arrested until *four* hours later when he returned to the apartment. It was held that the search was incidental to the arrest.

Under circumstances similar to *Williams*, the California Supreme Court reversed Marshall's conviction in a four-to-three decision. The majority ruled that the search was not substantially contemporaneous with the arrest. In adopting this view, they disapproved of the aforementioned cases to the extent that such cases were contrary to their conclusion.[24]

Chief Justice Traynor, writing for the majority, strictly limited the contemporaneity that can be called "substantial." No longer will a search conducted four hours prior to arrest be considered incidental to that arrest. At some point the officers' explorations became an unlawful search and seizure. Arguably, the search was "one continuous transaction" inasmuch as the officers never left the premises, but it appears that under these circumstances such an approach will be unavailing.

Chief Justice Traynor dismissed the search as not "substantially contemporaneous" without defining the term. Suppose Marshall had returned in five minutes, or in sixty minutes, or had been arrested in a different part of the city. The Chief Justice was imprecise in overruling the aforementioned cases. Is it a sound distinction which permits Marshall's premises to be searched in his presence or if he returns in five minutes, but which disallows it if he successfully eludes the police or returns four hours later? *Marshall* casts uncertainty on whether police officers should search after entering the premises under authority of Penal Code section 844. If the suspect successfully eludes them and returns more than four hours later, or perhaps even sooner, any evidence seized may be inadmissible in court. The police must not search prematurely. One conclusion to be drawn is that effective police surveillance in similar situations is exigent.

When the alternatives are considered, the prescience of Chief Justice Traynor's reasoning becomes clear. To enable the police to search and then arrest would be productive of misadventure. Notwithstanding the safeguard that there must be probable cause to arrest at the inception, the temptation accorded zealous officers to make unwarranted invasions of persons and property should be attenuated. Mere inconvenience in obtaining a search warrant is not a compelling reason to forego constitutional requirements. This is particularly so when there is neither imminence of violence or destruction of evidence nor any "probability of material change in the situation during the time necessary to secure [a search] warrant. Moreover, a short period of watching would have prevented any such possibility."[25]

---

[24] 69 Cal. 2d —, — n.3, 442 P.2d 665, 671 n.3, 69 Cal. Rptr. 585, 591 n.3 (1968).

[25] People v. Marshall, 69 Cal. 2d —, —, 442 P.2d 665, 671, 69 Cal. Rptr. 585, 591 (1968).

The cases frequently draw a distinction between being arrested in one's premises and being arrested away from them. In the former the incidental search will include the premises, assuming the arrest and search are incidental in point of time, whereas in the latter the premises cannot be searched in the absence of a search warrant. Noting the danger, Judge Learned Hand warned, "It is a small consolation to know that one's papers are safe only so long as one is not at home."[26]

Chief Justice Traynor could have reversed the conviction solely on the ground that the search was not contemporaneous, but he chose to introduce additional grounds for reversal. Indeed, the principal part of his opinion and the entire dissent are addressed to a sight-olfaction distinction and to whether in the course of a lawful search for suspects, police officers may rely on their sense of smell to seize contraband. The Chief Justice ultimately distinguished contraband that is visually in front of the officers' noses from that which is olfactorily in front of the officers' noses.

There has been a paucity of cases treating this precise point, but it has generally been held that officers may employ any of their senses, including their sense of smell, in searching for contraband.[27] In *United States v. Mullen*[28] agents smelled the aroma of whiskey which they believed was being emitted from an illicit still. The court held that although the odor might form a valid basis for the issuance of a search warrant, it will not justify a search and seizure without a warrant.

Chief Justice Traynor conceded that the officers lawfully entered the premises and that during a search for persons believed to be in hiding, they may seize evidence "in plain sight."[29] He recognized that it cannot reasonably be believed that the suspects were hiding in a brown paper bag. He ruled that " '[i]n plain smell' . . . is plainly not the equivalent of 'in plain view.' "[30] As in *Mullen*, the majority held that detection of contraband by smell justifies only the issuance of a search warrant, not seizure without a warrant. Therefore, the officers' invasion of the brown paper bag constituted a search.

What does this distinction mean? *People v. Marshall* questions whether olfaction will justify a search of vacant premises without a warrant and concludes that it will not. The majority sanctions police reliance on the sense of smell, but only to confirm their observation of *already visible* contraband.[31]

---

[26] United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926).

[27] Johnson v. United States, 333 U.S. 10 (1948); People v. Clifton, 169 Cal. App. 2d 617, 337 P.2d 871 (1959).

[28] 329 F.2d 295 (4th Cir. 1964).

[29] People v. Marshall, 69 Cal. 2d —, —, 442 P.2d 665, 668, 69 Cal. Rptr. 585, 588 (1968); People v. Roberts, 47 Cal. 2d 374, 379, 303 P.2d 721, 724 (1956).

[30] People v. Marshall, 69 Cal. 2d —, —, 442 P.2d 665, 670, 69 Cal. Rptr. 585, 590 (1968).

[31] *Id.* at —, 442 P.2d at 669, 69 Cal. Rptr. at 589.

Without objecting to *Marshall*, the State could seek to confine the significance of the case to its facts—the warrantless search of an absent defendant's premises. But a closely linked problem arising from the decision is whether the sense of smell, unaccompanied by other sensory perceptions or corroborating information, will justify an arrest without a warrant, thereby validating the subsequent incidental search. Penal Code section 836[32] sanctions warrantless arrests by the police if there is probable cause to believe that defendant has committed a felony.[33] The courts have allowed the officer to use any of his senses in determining whether an offense has been committed.[34] However, only two cases have arisen in California where the court has relied on olfaction to furnish the *exclusive* cause for arrest and search without a warrant.

In *People v. Bock Leung Chew*[35] police officers en route to another apartment in defendant's building detected the odor of opium emanating from defendant's apartment. Acting without prior knowledge or suspicion, they gained entry and uncovered yen shee, a derivative of opium. Defendant was arrested the next day. The decision rested neither on the question of consent nor on the contemporaneity of the search. The issue was whether the odor indicated an offense being committed in the presence of the officers. The district court of appeal inferred possession of opium from detection of its odor, thereby making it tantamount to a felony being committed in the officers' presence.

In the case of *People v. Barcenas*[36] the marijuana odor emanated from a closed suitcase. The officer's sense of smell furnished probable cause to arrest the owner of the luggage, thus authorizing an incidental search.

Even in the absence of the sight-olfaction distinction, the *Marshall* decision casts doubt on the validity of the search in *Bock Leung Chew*. Since the search occurred seventeen hours prior to the arrest, it was not sufficiently contemporaneous with the arrest. But if the fact situation is altered to place the defendant in the apartment, we are confronted with more perplexing circumstances. Will the sense of smell still afford probable cause for arrest thereby validating the incidental search? *Marshall* is silent on this issue. Indeed, the majority fails even to cite *Bock Leung Chew* or *Barcenas*.

---

[32] CAL. PEN. CODE § 836 (West Supp. 1968).

A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:
1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
2. When a person arrested has committed a felony, although not in his presence.
3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

[33] People v. Williams, 255 Cal. App. 2d 653, 63 Cal. Rptr. 501 (1967).

[34] Sarafini v. City and County of San Francisco, 143 Cal. App. 2d 570, 300 P.2d 44 (1956); People v. Hughes, 240 Cal. App. 2d 615, 49 Cal. Rptr. 767 (1966).

[35] 142 Cal. App. 2d 400, 298 P.2d 118 (1956).

[36] 251 Cal. App. 2d 405, 59 Cal. Rptr. 419 (1967).

Analogizing *Marshall* to this situation dictates the conclusion that olfaction, operating as the exclusive determinant, will not furnish probable cause to effect a warrantless arrest. The majority is alarmed at the prospect of invasions of privacy caused by an erring sense of smell. The same policy considerations, when extended to arrest, should not render the sense of smell any less errant. The olfactory sense might be a fruitful means of law enforcement, but not if it opens the door "to snooping and rummaging through personal effects."[37] In light of the reasoning adopted by the majority in *Marshall*, it would be inconsistent to indirectly predicate a search on the same grounds they rejected. This conclusion is further supported by the Chief Justice's concession that there did exist probable cause to obtain a search warrant. It would be anomalous to deny the search in the *Marshall* situation, but to permit it on the basis of the very same sensory perception because it operates to afford probable cause to make an arrest.

In addition to lending itself to differentiation on its facts, *People v. Marshall* can be distinguished from the warrantless arrest in terms of policy. Curtailing the warrantless search of vacant premises will not ordinarily produce the risk that the suspect will escape or that the contraband will be destroyed. If *Marshall* precludes arrest on the basis of smell, the difficulties added to law enforcement are evident.

On the other hand, the sense of smell is fruitful only in contraband crimes such as those involving narcotics or liquor. Since these crimes are not normally consummated by means of violence, it is not amiss to infix individual protections. Enforcing constitutional requirements will safeguard the public without the prospect of violent disorder.

We can expect olfaction, if accompanied by even slight additional information, to provide probable cause for arrest. Whereas *Bock Leung Chew* appears to be tacitly overruled on the grounds of contemporaneity of the search, and of smell affording probable cause to arrest, *Barcenas* can be distinguished. In that case the officers had additional corroborating information and did not rely merely on their sense of smell.[38]

Perceiving that officers engaged in the often competitive enterprise of ferreting out crime are sometimes overzealous, Chief Justice Traynor foreclosed unnecessary inroads into the privacy guaranteed by the Fourth Amendment. By restricting the warrantless search and presumably the warrantless arrest with the attendant incidental search, the Chief Justice responded to the principles generated by the Fourth Amendment.

---

[37] People v. Marshall, 69 Cal. 2d —, —, 442 P.2d 665, 670, 69 Cal. Rptr. 585, 590 (1968).

[38] *Marshall* raises an interesting question regarding the use of Ginger the police dog. Ginger is trained by the Los Angeles Police Department to sniff out marijuana at places of its entry. If her sense of smell is vicariously transferred to the officers, *Marshall* casts a shadow on the propriety of the subsequent arrest and search. Of course, judicial notice could be taken of the acuity of Ginger's olfactory sense.

Conceding that Marshall is guilty of possession of marijuana in a substantive sense, we must not lose sight of the fact that only those searches in which the police "guess" correctly reach the courts. We never see those "arrests" where no contraband is uncovered. It can only be speculated how many law-abiding citizens are subjected to detention or degradation and their persons or homes searched without unveiling the fruits of crime.[39]

In an area of jurisprudence that abounds with discord, *People v. Marshall* seeks to curb the abuses caused by the warrantless search and the warrantless arrest, whether the abuses spring from overzealous law enforcement, or from an erring sense of smell. The Fourth Amendment, vigilantly reinforced in *People v. Marshall*, stands ready to guard the people's rights lest we find ourselves prone to the plight that occasioned the authoring of the Fourth Amendment.

Richard Ross

[39] Justice Jackson, speaking also as a former Attorney General of the United States, asserted: "Only occasional and more flagrant abuses come to the attention of the courts. . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which the courts do nothing, and about which we never hear." Brinegar v. United States, 338 U.S. 160, 181 (1949), *rehearing denied*, 338 U.S. 839 (1949).