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Criminal Law: Search and Seizure--Validity of Second Search

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The conclusion of the court seems correct, however, in that it places public morals before the selfish desires of others. It is conceded that for the public good, newspapers should be able to observe most criminal trials, but for the benefit of public morals, a line must be drawn in cases involving salacious testimony. Obviously, the court's guiding light was public policy in the promotion of public morals. However, the question arises as to why the court did not consider the public's right to observe court proceedings through the medium of a newspaper. The answer is that the court did, by weighing a right to free reporting against the promotion of better public morals, and found the answer to be in the form of a compromise. To place a limitation on reporting of criminal or civil trials which contain evidence that is, in the court's opinion, harmful to public morals, is not such a drastic limitation as would hamper the functions of either newspapers or justice. The fact that in such trials the accused has a right to have his friends and relatives with him in the courtroom would negate any idea that the judicial system is denying the accused a public trial.

In 1923, the American Society of Newspaper Editors adopted canons of journalism.[21] Under the heading of "Responsibility" is stated this principle:

> "The right of newspapers to attract and hold readers is restricted to nothing but consideration of public welfare."

Under the heading of "Decency" is stated that a newspaper that supplies incentives to base conduct, such as are to be found in details of crime and vice, cannot escape being charged with insincerity while professing a high purpose. The canons of journalism went on to say that such rules were unenforceable, but expressed the hope that effective public disapproval would prevent such conduct.

The members of appellant's own profession have set down a rule of ethics that appellants are trying to avoid. It therefore appears that the motive of the appellants was not the protection of the public, but their own unethical gain. In the light of this, the decision of the trial judge in the *Jelke* case[22] was in the furtherance of public policy; that is, the protection of public morals.

However, to give trial judges such discretion to bar spectators can be dangerous to our judicial system, and every precaution should be taken to see that such discretion does not extend beyond cases which would seriously affect public morals.

John H. Baker.

CRIMINAL LAW: SEARCH AND SEIZURE—VALIDITY OF SECOND SEARCH.—In a recent case decided by the Supreme Court of Tennessee[1] it was held to be an unreasonable search and seizure, under their Constitution, when an officer making a search under a valid search warrant found nothing, but returned an hour later and made a subsequent search, this time discovering the whiskey on which the conviction rested.

The question of whether such a second search is valid or not[2] is handled by the court as a matter to be decided upon its interpretation of the constitutional provision of unreasonable search and seizure. The court reasoned that if a search warrant once served but not returned can be used a second time within its duration, then

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[21] 10 BULL., N. Y. COUNTY LAW ASSN. 202-5 (May, 1953)

[22] See note 2 *supra.*

[1] McDonald v. State, —— Tenn. ——, 259 S.W.2d 254 (1953)

[2] Colburn v. State, 78 Okl.Cr. 362, 148 P.2d 483 (1944); Gamble v. Keyes, 35 S.D. 644, 153 N.W. 888 (1915); State v. Moran, 103 W Va. 753, 138 S.E. 366 (1927).

logically it could be used an unlimited number of times and become a means of tyrannical oppression in the hands of unscrupulous officers.

The three cases cited by the court seem in general to follow the reasoning of the principal case, but some distinction can be made.

In *Colburn* v. *State*,[3] it was held not to be an illegal search when officers returned a little later at the request of the defendant.[4] Although the court in that case implied that if a subsequent search had been made under the one warrant it might be an illegal search, the court did not pass on it, since obviously merely speaking with the defendant did not constitute a search. Thereby only one search had been made.

In *Gamble* v. *Keyes*,[5] officers had a warrant for arrest. They had taken some liquor as evidence at the time of arrest and later returned under the authority of the same warrant to seize other liquor that they had overlooked. Here, clearly, no valid search warrant had ever issued, but only a warrant of arrest. Logically, such a warrant was executed when the arrest was made and gave no authority in itself to search a house except as a consequence of and at the time of the arrest. Therefore that case is clearly distinguishable from the principal case on the facts. The reasoning, however, is similar in that the court said: "If he may thus return after an arrest, a like forceable entry within a week or month would be equally justifiable."[6]

In *State* v. *Moran*,[7] probably the strongest case in point, practically an identical set of facts appears as in the principal case. The court there granted that the officers made their searches under a valid warrant, but that the methods applied in its execution were unreasonable. Unlike the principal case, the court did not assume that such was an unreasonable search and seizure. It looked to the facts of the specific case, and the actions of the officers serving the warrant. It determined the question purely on whether their acts were reasonable and not on the reasoning of the principal case, which holds a subsequent search under a valid warrant unreasonable in itself. Therefore, it would seem by the court's discussion in the *Moran* case that if the facts were such as to make it reasonable for the officers to return a second time (which clearly it did not find), then it might be considered not to be an unreasonable search and seizure to make such second search. The question which presents itself when comparing these two cases would seem to be then: (1) whether the court should determine the case with respect to the reasonableness of the surrounding circumstances, or (2) place its decision on a broad policy basis.

Light can be thrown on this question by analyzing the case of *Duncan* v. *State*.[8] There the defendant was convicted of manslaughter in the lower court and defendant assigned as error the following instruction, "You are instructed that after a search warrant has been executed and the property and things therein described have been seized thereunder, its office has been performed and a lawful search cannot again be made thereunder." The upper court said with approval: "This instruction is a correct statement of the law and properly given. The principle it states is so elementary

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[3]78 Okl.Cr. 362, 148 P.2d 483 (1944).

[4]Johnson v. State, 146 Miss. 593, 111 So. 595 (1927) (Search not void because officers went over a second time, it not being previously abandoned or completed but being continuous.).

[5]35 S.D. 644, 153 N.W. 888 (1915).

[6]*Id.* at 645, 153 N.W. at 889.

[7]103 W.Va. 753, 138 S.E. 366 (1927).

[8]11 Okl.Cr. 217, 144 Pac. 629 (1914).

and well understood that a man of ordinary intelligence would need no advice thereon."[9]

As seen from the instruction in the case, nothing was said on the question whether the search and seizure was unreasonable or not. The court bases its decision primarily on whether the warrant used upon the second search was still in effect. It should be noted that in the *Moran* case the court felt the warrant to be valid but its execution to be unreasonable. The principal case, on the other hand, says nothing about whether the warrant was valid or whether execution was unreasonable. It merely said that the second search was a violation of the unreasonable search and seizure clause of the Tennessee State Constitution, basing its reasoning on what might happen in other cases if such were considered a reasonable search under the Constitution, rather than determining whether the actual search was reasonable.

To get a clearer picture of the three cases, one must look to what is meant by or how the courts seem to interpret the unreasonable search and seizure clause of the Constitution. An unreasonable search under the Constitution can be one of three things: (1) A search without a warrant,[10] (2) a search with an invalid warrant,[11] (3) a search with a valid warrant but executed unreasonably by the officer serving it.[12]

The first two have nothing to do with a judicial interpretation of "reasonableness" as the word is used literally. They merely afford a means by which the people are protected from unruly or arbitrary action, by putting a limitation on the powers of search and seizure. Therefore, if the court in the principal case was basing its decision on the theory of either (1) or (2) *supra* it would not have to determine whether the actual act itself was unreasonable, but only whether it was an unreasonable search in that it lacked the requisites of a proper warrant. It then can be seen that the act of the search itself may be clearly reasonable according to common standards, but unreasonable under the unreasonable search and seizure clause as interpreted by the courts. Therefore, as in the *Duncan* case, the court would need only to pass on the validity of the warrant and not on the reasonableness of the search. On the other hand, if the court based its decision on number (3), that is, holding the warrant to be valid but its execution to be unreasonable, the court would have to determine, as in the *Moran* case, whether the officer's acts in the execution of the warrant were reasonable.

In determining whether the act of an officer serving a warrant is reasonable the court should look to the specific instance in the light of the surrounding circumstances[13] and not, as the principal case does, by looking beyond the facts of the case, when it says to hold such as being reasonable would open the door to tyrannical oppression. Each case then, on the question whether the execution of the warrant was reasonable, should be determined on its own merits. To determine one act to be unreasonable on the ground that it might induce other acts which are clearly unreasonable is to put a limitation on the execution of a search warrant, and not to determine whether the execution made by the officer is reasonable or not.

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[9]*Id.* at 223, 144 Pac. at 632. See Adocox v. State, 54 Okl.Cr. 23, 13 P.2d 593 (1932); Lawton v. Cordell, 22 Vt. 524 (1850); Lehrer v. State, 183 Wis. 339, 340, 197 N.W. 729, 730 (1924) (A search warrant is executed by making a search of the premises.).

[10]Levy v. State, 31 Okl.Cr. 199, 238 Pac. 235 (1925); State v. Slat, 98 W.Va. 288, 127 S.E. 191 (1925).

[11]Gore v. State, 240 Okl.Cr. 394, 218 Pac. 545 (1923); McClure v. State, 31 Okl.Cr. 60, 237 Pac. 145 (1925).

[12]State v. Moran, 103 W.Va. 753, 138 S.E. 366 (1927).

[13]Cleek v. State, 192 Tenn. 457, 241 S.W.2d 529 (1951).