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Richard H. Parker

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SEARCH AND SEIZURE—THE FLORIDA AUTOMOBILE CASES

INTRODUCTION

The concept of the search warrant and the federal and state constitutional provisions dealing with search and seizure are basic and fundamental American law.\(^1\) Two centuries ago, the Wilkes case\(^2\) and the words of James Otis\(^3\) denouncing the Writs of Assistance\(^4\) played a large part in precipitating the American Revolution. To insure against the reoccurrence of government sanctioned unreasonable searches and seizures, prohibition of such searches and seizures was embodied in one of the articles of the Bill of Rights.\(^5\) The maxim "every man's home is his castle"\(^6\) has been so thoroughly ingrained in American and Anglo-Saxon law and thought as to be almost axiomatic.\(^7\)

And yet, despite its apparent force and weight, a single Chicago court recorded 4,593 violations of this right in a single year.\(^8\) The task of teaching the law enforcement officer the great value of guarding and preserving this civil liberty seems an almost impossible one. His eagerness to convict the guilty apparently leaves little room for consideration of

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\(^1\) Freedom from unreasonable search and seizure is guaranteed in the federal and all state constitutions. For a collection of these provisions, see Cornelius, Search and Seizure 9-12 (1926).

\(^2\) Wilkes v. Wood, 3 Geo. 3, 19 St. Tr. 1153 (1763). See also Etnick v. Carrington, 6 Geo. 3, 19 St. Tr. 1630 (1765). The decisions rendered in these two cases are set out and noted in Broom, Constitutional Law 548-623 (1865).

\(^3\) See the text material cited in note 2 supra. See also note 4 infra.

\(^4\) These writs empowered revenue officers, in their discretion, to search suspected places for smuggled goods and to seize such goods if found. They were termed by James Otis to be the "worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of English law, that ever was found in an English law book." Boyd v. United States, 116 U.S. 616, 623-25 (1885).

\(^5\) U.S. Const. Amend. IV.


\(^7\) This phrase has been employed by courts and writers innumerable times. Its acceptance and adoption seems almost unanimous. E.g., Weeks v. United States, 232 U.S. 383, 390 (1914); Wilson v. State, 30 Fla. 234, 253, 11 So. 556, 561 (1892) ("... (O)ne's home is the castle of defense for himself and his family."). 1 Cooley, op. cit. supra note 2, at 611, quotes the words of Chatham in defense of this proposition, "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 rains may enter; but the King of England may not enter, all his forces dare not cross the threshold of the ruined tenement.")

the legality and propriety of the means used to achieve his end. For, in practice, it is usually the guilty who benefit from this right.\(^9\)

In recent decades, Prohibition and the use of the automobile to transport contraband created a new difficulty in the application of the established law.\(^10\) Courts were compelled to determine what rules were to be applied to the search of automobiles and the seizure of their contents. Was a warrant necessary? If not, what was required? What exceptions were to be made to existing law? What standards and criteria were to be employed?

Three decades of decision, change, and innovation seem to have answered most of these questions. In this comment, the law of search and seizure in Florida will be presented, as will be those few questions and problems which seem, as yet, unanswered and unsolved.

**SEARCH AND SEIZURE IN GENERAL.**

The right of citizens to have their persons, houses, and effects secured against unreasonable searches and seizures is guaranteed by both the Florida\(^11\) and federal\(^12\) constitutions. Although the Fourth Amendment affects neither the proceedings of state courts nor the actions of state officers,\(^13\) statements of the Florida court as to the weight to be afforded federal interpretations of this guarantee make the discussion of certain

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9. "It is oftimes better that crimes should go unpunished then that citizens should be liable to have their premises invaded . . . ." De Lancy v. City of Miami, 43 So.2d 856, 857 (Fla. 1954). See the separate dissents of Justices Frankfurter and Brandeis in Olmstead v. United States, 277 U.S. 438, 470, 484 (1928) (Frankfurter, J., stated "... I think it less evil that some criminals should escape than that the government should play an ignoble part." Brandeis, J., stated "The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen . . . ."). See also ibid ("... (T)he victims of illegal searches are usually law breakers."). In speaking of this situation, one author noted that "violators of the law find themselves undeserving beneficiaries of a roundabout technique supposed to make police and prosecutors mend their ways." Maguire, Evidence, Common Sense and Common Law 125 (1947).

10. See Machen, op. cit. supra note 2, at 48, "The rank lawlessness of the prohibition era in general, and the flagrant violation of liquor laws with the use of modern automobiles, airplanes and high speed boats in particular became the exception for recognizing the newly developed necessity for making an exceptional case of the moving vehicle." This problem is further discussed in Blakemore, National Prohibition 475-76 (1925). See also note 8 supra.

11. The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and thing or things to be seized. FLA. CONST. D. R. § 22.

12. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. U.S. CONST. Amend. IV.

It should be noted that, with the exception of minor differences in phraseology and punctuation, the Florida and federal provisions are identical.

federal rules necessary for a complete presentation of Florida law. Because, as will be shown later, the Florida and federal law of search and seizure are almost identical, Florida and federal cases will be used interchangeably in support of some of the general statements made herein.

The warrant

Except in certain extraordinary situations, a warrant must be sworn out before a citizen or his possessions may be legally searched. This warrant and the supporting oath must conform strictly to all statutory and constitutional provisions as to particularity of person(s) or place(s) to be searched and object(s) to be seized.

The oath supporting the warrant must be based on probable cause. Since probable cause is not only a prerequisite for the issuance of a valid warrant, but is also one of the factors which, under some circumstances, may justify a search without a warrant, some definition of this term is needed. A thorough and comprehensive attempt at such a definition by the Florida Supreme Court is found in Dunnavant v. State:

... A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. The courts in determination of the existence of

14. Atz v. Andrews, 84 Fla. 43, 51-52, 94 So. 339, 332 (1922) ("Whatever other state courts may do, the Supreme Court of Florida will guard and protect the constitutional rights, privileges and immunities of the people as sacredly as the federal courts."). This aim as well as the oft-noted (e.g., Church v. State, 151 Fla. 24, 9 So.2d 164 (1942); Thurman v. State, 116 Fla. 426, 156 So. 484 (1934)) similarity of language between the Florida and federal constitutional provisions (see notes 11 and 12 supra) have resulted in great weight being given to federal interpretations of the guarantee. See note 90 infra.
15. See note 60 infra.
16. Except for those instances cited in note 60 infra, all searches without warrant are considered unreasonable and, therefore, unconstitutional. See notes 11 and 12 supra.
17. A comprehensive survey of what is required in the oath and warrant, and reproductions of oaths and warrants which have been held constitutional may be found in "A Brief on Searches and Seizures, Probable Cause, and Arrests," prepared by the Attorney General's Office, Tallahassee, pp. 2-10.
18. Bonner v. State, 80 So.2d 683, 684 (Fla. 1955) ("... Any designation or description known to the locality that points out the place to the exclusion of all others and leads the officer unerringly to it satisfies the requirement."). Although the officer should include the names of the owners of the property, if such persons are unknown, he may so state. Harvey v. Drake, 40 So.2d 214 (Fla. 1949); Church v. State, 151 Fla. 24, 9 So.2d 164 (1942).
However, where a certain Freddie Jenkins lived in a room in the home of a third party, a description authorizing the search of "the dwelling house of Freddie Jenkins" was held insufficient due to the failure to mention the third party. Jackson v. State, 87 Fla. 262, 99 So. 548 (1924).
20. See notes 11 and 12 supra.
21. See notes 82 and 83 infra and the related text.
22. 46 So.2d 871 (Fla. 1950).
probable cause are not concerned with the question of guilt or innocence of the accused but whether or not the affiant has reasonable grounds for his belief.\(^\text{23}\)

There need be no relation between the amount of evidence necessary to constitute probable cause and that amount required to convict.\(^\text{24}\)

However, even though all that is needed is evidence sufficient to convince a reasonable and prudent man that the offense has been committed,\(^\text{25}\) mere suspicion does not constitute probable cause.\(^\text{26}\)

An interesting problem regarding probable cause was recently settled by the Florida Supreme Court when, in Perez v. State,\(^\text{27}\) it was held that evidence which was not of such quality as to render it competent in a trial could be the basis for the affidavit supporting a search warrant.\(^\text{28}\)

By holding that the evidentiary value of the supporting evidence was not a criterion of the sufficiency of such information, this decision seems to settle a problem which has existed in Florida courts since the United States Supreme Court ruling in Grau v. United States.\(^\text{29}\)

**Search without warrant**

(1) \textit{Waiver and consent.} Since these rights are personal, they may be waived.\(^\text{30}\) A voluntary consent\(^\text{31}\) or an invitation to search,\(^\text{32}\) whether

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\(^{23}\) Id. at 874.

\(^{24}\) United States v. McGuire, 300 Fed. 98, 102 (N.D.N.Y. 1924) ("'Beyond a reasonable doubt' must include 'probable cause.' But 'probable cause' does not include or measure up to satisfaction 'beyond a reasonable doubt' ").

\(^{25}\) Averill v. State, 52 So.2d 791 (Fla. 1951); DeLancy v. City of Miami, 43 So.2d 856 (Fla. 1950).

\(^{26}\) Kraemer v. State, 60 So.2d 615 (Fla. 1952).

\(^{27}\) Case No. 26,508, Florida Supreme Court, September 21, 1955.

\(^{28}\) This amounted to a repudiation of the statements made by the court in Borrego v. State, 62 So.2d 43 (Fla. 1952); and, DeLancy v. City of Miami, 43 So.2d 856 (Fla. 1950).

\(^{29}\) 287 U.S. 124 (1932). That portion of the Grau case which dealt with the competency of evidence supporting the oath was overruled in Brinegar v. United States, 338 U.S. 160 (1949). In the Perez case, the court noted that, though the Brinegar case was decided before the Borrego and DeLancy cases (see supra note 28), the Grau case was followed since the Brinegar case was not mentioned to the court. The implication seems to be that the rule of the Perez case would have been law several years ago had the Brinegar case been cited earlier.

\(^{30}\) Escobio v. State, 64 So.2d 766 (Fla. 1953). See also those cases cited in notes 31 through 34 infra.

\(^{31}\) James v. State, 80 So.2d 699 (Fla. 1955); Simring v. State, 77 So.2d 833 (Fla. 1955). Of course, the consent must be voluntary. Thus, where officer entered a room and brandished guns, the search was held invalid even though defendant made no objection. Boynton v. State, 64 So.2d 336 (Fla. 1953).

\(^{32}\) Cant v. State, 114 Fla. 23, 152 So. 710 (1934). However, inviting an officer to enter after he has knocked on the door does not constitute an invitation to search. Atz v. Andrews, 84 Fla. 43, 94 So. 329 (1922).
express or implied,\textsuperscript{33} by the accused or by some proper party,\textsuperscript{34} will serve to validate an otherwise illegal search.\textsuperscript{35}

(2) Search incidental to arrest. When a valid legal arrest\textsuperscript{40} is effected, a search incidental to that arrest may be made.\textsuperscript{37} Since a warrant is not necessary in many types of arrests,\textsuperscript{38} this rule also permits certain searches without warrant.\textsuperscript{39} Although the courts have had a great deal of difficulty in attempting to define the limits of the term "incidental to arrest,"\textsuperscript{41} it is generally agreed that the driver and his automobile are within the scope of this doctrine.\textsuperscript{41} However, a recent Florida case held that the search of the trunk of an automobile is not appropriately incidental to arrest;\textsuperscript{42} the effect and weight of this holding on the general rule will be discussed later.\textsuperscript{43}

(3) Where circumstances preclude obtaining a warrant. This is the final exception to the general rule, is relatively new,\textsuperscript{44} and, therefore, somewhat difficult to define. The great majority of cases in which it has been applied have dealt with the search and seizure of automobiles.\textsuperscript{45} For this reason, this exception will be considered at greater length in the following section.

\textbf{Consequences of an illegal search}

(1) Exclusion of evidence. Today, authority is divided as to the admissibility of evidence procured by illegal search and seizure.\textsuperscript{46} Florida,

\begin{itemize}
\item \textsuperscript{33} Carlton v. State, 111 Fla. 777, 149 So. 767 (1933).
\item \textsuperscript{34} Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937) (Father could permit officers to search his son's room when the son lived in the father's house).
\item \textsuperscript{35} A wife does not have the inherent right to waive the rights of the husband. However, when the husband had permitted a search and the next day the wife allowed another officer to search, the second search was held to be valid. Carlton v. State, 111 Fla. 777, 149 So. 767 (1933).
\item \textsuperscript{36} E.g., Carlton v. State, 111 Fla. 777, 149 So. 767 (1933); Chandler v. State, 93 Fla. 1063, 113 So. 91 (1927). For a collection of such cases, see Cornelius, op. cit. supra note 2, at 69-79.
\item \textsuperscript{37} 1 Alexander, The Law of Arrest 345-518 (1949).
\item \textsuperscript{38} Fla. Stat. § 901.15 (1953). See also Alexander, op. cit. supra note 36, at 519-23.
\item \textsuperscript{39} Fl. Stat. §§ 901.15, 901.21 (1953). See also Burnside v. State, 55 So.2d 107 (Fla. 1951); Diaz v. State, 43 So.2d 13 (Fla. 1949).
\item \textsuperscript{40} For a collection and discussion of some of the cases attempting to define this term, see Ramsey, Acquisition of Evidence by Search and Seizure, 47 Mich. L. Rev., 1137, 1143-56 (1948-49).
\item \textsuperscript{41} E.g., Kraemer v. State, 60 So.2d 615 (Fla. 1952); Graham v. State, 60 So.2d 186 (Fla. 1952); Burley v. State, 59 So.2d 722 (Fla. 1952).
\item \textsuperscript{42} Courington v. State, 74 So.2d 652 (Fla. 1954).
\item \textsuperscript{43} See pp. 67, 68 infra.
\item \textsuperscript{44} This exception was announced just three decades ago in Carroll v. United States, 267 U.S. 132 (1925).
\item \textsuperscript{45} However, this rule could be applied to any mobile instrumentality. E.g., State v. Kinnear, 162 Wash. 214, 298 Pac. 449 (1931) (Search of an airplane without warrant but based on probable cause).
\item \textsuperscript{46} For a complete analysis of all state jurisdictions on this issue, see the appendix to Justice Frankfurter's opinion in Wolf v. Colorado, 338 U.S. 25, 33-39 (1948).
\end{itemize}
adopting the federal "exclusion" rule, 47 forbids the admission of such evidence.48 However, many states49 and most common law countries50 adopt the so-called "historical" view and permit the use of illegally seized evidence if it is relevant and pertinent.51

(2) Other consequences. Even in those jurisdictions which permit the use of evidence obtained by an illegal search and seizure, the affected party is still not remediless.52 Damages may be recovered from the searching officer in an action of trespass.53 Many states and federal statutes have provided various other remedies to persons injured as a result of a violation of this right.54

Conclusion

The foregoing discussion has presented the basic structure of the law of search and seizure. The application of these general rules to searches of automobiles will be considered in the next section.

Search of Automobiles

The rules governing the search of automobiles and the seizure of their contents present an exception to the general rules of search and seizure. This exception has been recognized by the United States Supreme Court,55

51. Perhaps the most comprehensive work presenting and analyzing the various positions of all jurisdictions is a (soon to published) treatise entitled "Search and Seizure in Florida. What Shall be Done With Illegally Acquired Evidence?" This study of the problem was prepared for the Dade County Grand Jury in 1954 by Richard A. Hausler, Associate Professor of Law at the University of Miami.
52. All jurisdictions recognize the right to sue for injuries resulting from an illegal search and seizure. Numerous cases are collected in 1 CORNELIUS, CONSTITUTIONAL LIMITATIONS 638-87 (8th ed., Carrington 1926). See also note 8 supra.
53. E.g., Ball v. Armstrong, 48 So.2d 467 (Ala. 1950); Walker v. Graham, 228 Ala. 574, 154 So. 806 (1934); Young v. Western & A. R. Co., 39 Ga. App. 761, 148 S.E. 414 (1929); Ingraham v. Blevins, 236 Ky. 505, 33 S.W.2d 357 (1930).
54. A federal statute makes it a crime for a federal officer to exceed his authority in executing a warrant (18 U.S.C. § 2234 (1952)), to procure a warrant maliciously (18 U.S.C. § 2235 (1952)), or, under some circumstances, to search without a warrant (18 U.S.C. § 2236 (1952)).
the Florida Supreme Court,\textsuperscript{56} and by the Florida legislature.\textsuperscript{57} As was stated by Mr. Chief Justice Taft in the much noted and oft-cited \textit{Carroll} case:\textsuperscript{58}

\(\ldots\) (T)he guaranty from unreasonable searches and seizures by the 4th amendment has been construed \ldots as recognizing a necessary difference between a search of a store, dwelling or other structure \ldots and a search of a ship, motorboat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant before the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.\textsuperscript{59}

Hence, thoroughly convinced of the existence of some difference in the law of search and seizure as applied to automobiles, the courts have been (and are now in the process of) defining and delimiting this difference.

\textbf{General rules}

A warrant is necessary in all searches except where waived or where incidental to arrest or, in some situations, where circumstances preclude the obtaining of a warrant.\textsuperscript{60} Obviously, if a valid warrant has been sworn out, the named automobile driver may be stopped, searched, and contraband seized.\textsuperscript{61} Equally apparent is the invalidity of a search founded on the mere suspicion or caprice of the searching officer.\textsuperscript{62} However, many situations are not susceptible to such simple classification. It is these cases in the "grey" area with which we will be concerned herein.

\textbf{Automobile search without warrant}

(1) \textit{Incidental to arrest}. The application of the doctrine of "search incidental to arrest" to cases of automobile search and seizure is sanctioned by Florida case\textsuperscript{63} and statutory\textsuperscript{64} law. Hence, arrest for any violation of the law permits the arresting officer to search both the arrested party and the automobile driven at the time of the arrest.\textsuperscript{65}

\textsuperscript{56} E.g., Collins v. State, 65 So.2d 61 (Fla. 1953); Brown v. State, 46 So.2d 479 (Fla. 1950); Longo v. State, 157 Fla. 668, 26 So.2d 818 (1946).
\textsuperscript{57} FLA. STAT. § 933.19 (1953). This statute adopts the decision of the \textit{Carroll} case verbatim, reprinting that decision in its text.
\textsuperscript{58} Carroll v. United States, 267 U.S. 132 (1925).
\textsuperscript{59} Haile v. Gardner, 82 Fla. 355, 359, 91 So. 376, 378 (1921). Collins v. State, 65 So.2d 61 (Fla. 1953), presents a discussion of the origin and development of the rule permitting search without warrant in certain cases where circumstances preclude the obtaining of a warrant. Waiver and consent, as exceptions to the general rule requiring a warrant, are discussed at pp. 57, 58 \textit{supra}.
\textsuperscript{60} "No search or seizure is permissible under the law without a proper warrant duly issued, except as \ldots may be allowed by law as an incident to a lawful arrest." Haile v. Gardner, 82 Fla. 355, 359, 91 So. 376, 378 (1921). Collins v. State, 65 So.2d 61 (Fla. 1953), presents a discussion of the origin and development of the rule permitting search without warrant in certain cases where circumstances preclude the obtaining of a warrant. Waiver and consent, as exceptions to the general rule requiring a warrant, are discussed at pp. 57, 58 \textit{supra}.
\textsuperscript{61} Such searches are expressly permitted by both the Florida and federal constitutions. See notes 11 and 12 \textit{supra}.
\textsuperscript{62} Kraemer v. State, 60 So.2d 615 (Fla. 1952); Kersey v. State, 58 So.2d 155 (Fla. 1952).
\textsuperscript{63} E.g., Collins v. State, 65 So.2d 61 (Fla. 1953).
\textsuperscript{64} FLA. STAT. § 901.21 (1953).
\textsuperscript{65} Collins v. State, 65 So.2d 61 (Fla. 1953); Italiano v. State, 141 Fla. 249, 193 So. 48 (1940), cert. denied, 310 U.S. 640 (1940).
However, the violation must be real and not merely a device to provide an excuse for an otherwise illegal search. A technical violation of the law is not sufficient reason to stop and search a driver and his vehicle.

To be valid, the search must be made after the arrest is effected. An illegal search, void ab initio, cannot be made legal by the fruits it produces. Thus, where an officer stopped defendant's car, inspected his license, flashed a light in the back seat and lifted up a package therein which revealed contraband, and then arrested the defendant, it was held that, since there had been no arrest at the time the search started (i.e., when the officer picked up the package), the search was illegal.

There is no absolute test as to the validity of a particular search. Florida courts have repeatedly held that the validity of a search depends on its surrounding circumstances. However, due to the high value and basic nature of the rights herein discussed, the courts have invalidated almost every infringement whether attempted through legislative or other means.

A corollary to the "search incidental to arrest" doctrine is the "naked eye" exception. This situation arises when an officer is in a place where he has a right to be and, before he acts, he sees evidence of a crime which has been or is being committed. He may then arrest the suspect, seize the evidence and search incidental to the arrest.

Typical of this type of case was Fletcher v. State. There, officers who had been observing the defendant (a legal activity which did not

66. E.g., Collins v. State, 65 So.2d 61 (Fla. 1953) (crossing the highway center line three times); Graham v. State, 60 So.2d 186 (Fla. 1952) (crossing the center line); Burley v. State, 59 So.2d 722 (Fla. 1952) (passing on a curve).

67. Byrd v. State, 80 So.2d 694 (Fla. 1953).

68. Kraemer v. State, 60 So.2d 615 (Fla. 1952).

69. Collins v. State, 65 So.2d 61 (Fla. 1953); Brown v. State, 62 So.2d 348 (Fla. 1952); Kraemer v. State, 60 So.2d 615 (Fla. 1952).

70. Kraemer v. State, see note 69 supra.

71. Italiano v. State, 141 Fla. 249, 193 So. 48 (1940), cert. denied, 310 U.S. 640 (1940); Thurman v. State, 116 Fla. 426, 156 So. 484 (1934); Haile v. Gardner, 82 Fla. 355, 91 So. 376 (1921).

72. Ibid.

73. The court has, by dicta, repeatedly stressed this proposition. E.g., Brown v. State, 62 So.2d 348, 49 (Fla. 1952) ("The prohibition against unreasonable search and seizure is rooted deep in our legal and political heritage ... There is nothing so shocking or humiliating to one as having an officer abruptly take charge of his effects and proceed to explore them without any semblance of authority under law or permission from the owner to do so.").

74. E.g., Thurman v. State, 116 Fla. 426, 156 So. 484 (1934) (declaring unconstitutional § 7664 COMP. GEN. LAWS (1927)); Yaeger v. State, 78 Fla. 354, 83 So. 525 (1919) (declaring unconstitutional Laws of Fla., c. 4584 (1897)).

75. See note 113 supra.

76. E.g., Peterson v. United States, 297 Fed. 1,000 (9th Cir. 1924); Commonwealth v. Warner, 198 Ky. 784, 250 S.W. 86 (1923); State v. Quinn, 111 S.C. 174, 97 S.E. 62 (1918).

77. 65 So.2d 845 (Fla. 1953).
violate the defendant's rights) approached his car. Before arresting the defendant or ordering him from his car and without touching the defendant or his car, they saw papers in the back seat of the car and in the defendant's pocket which they recognized as contraband. The arrest, search and seizure that followed were held to be valid.

It is interesting to note the manner in which the Florida Supreme Court distinguished this case from Graham v. State. In the latter case, though the contraband was visible, defendant's automobile had been stopped for an alleged traffic violation. Since the search was based on the arrest for the traffic violation and the court found that no traffic violation had been committed, the arrest and all the proceedings that followed were ruled invalid.

(2) Search based on probable cause. Admitting the impossibility and impracticability of securing a warrant to search all moving vehicles, the Florida courts have adopted the doctrine of the Carroll case.

This decision stated, "In cases where seizure is impossible except without a warrant, the seizing officer acts at his own peril unless he can show the court probable cause." The use of "probable cause" as the criterion for determining the validity of automobile searches without warrant was reaffirmed in Husty v. United States.

The Carroll case is the law in Florida. In addition to the "probable cause" test enunciated there, Florida courts have adopted two other standards: "reasonable belief" and "trustworthy information." In all three instances, the officer arresting without a warrant must be prepared to convince the court that he possessed sufficient information upon which to base a warrant had he applied for one.

Conclusion

Thus, we see that a warrant is still necessary in most cases of automobile search and seizure. In addition to the well established exceptions permitting search without a warrant, the automobile has given rise to only one innovation: search without warrant based on probable cause. However, by demanding that the officer have information which could have been the basis for the issuance of a warrant, the courts have limited the weight and force of this exception and have protected a very basic right.

78. Id. at 846.
79. Id. at 846. It appears that this case does not actually constitute another exception to the general law. Since observation is not held to be a search, all that follows the initial observation would be properly classified as search incidental to arrest.
80. 60 So.2d 186 (Fla. 1952).
82. Id. at 156. (emphasis added)
83. 282 U.S. 694 (1931).
84. See notes 56 and 57 supra.
87. Collins v. State, 65 So.2d 61, 65 (Fla. 1953).
Observations

1. Generally. Any observation of the law of search and seizure must be made with an awareness of all of the problems involved. It is far the easier task to criticize the judiciary for its apparent tendency towards indecision, hazy rulings and vacillation, than to realize the dilemma which faces the courts each time they are forced to rule on a questioned search. Duty bound to uphold the constitutions of both the United States and Florida, as well as to affirm proper convictions of lower courts, the Florida Supreme Court is often forced to make “hairline” rulings as to whether a constitutional guarantee has been violated—a ruling which could free an individual who has been otherwise proven and adjudged guilty.

The observer must also consider the practical aspects of the problem: reluctance to hinder law enforcement officers with technicalities; hesitancy to return proven criminals to society; and, probably above all, a desire to punish those who have broken the law. These practical considerations must be weighed with the policy considerations which resulted in the passage of the Fourth Amendment and Section 22 of the Florida Constitution’s Declaration of Rights: the privacy of an individual and the sanctity of his home and possessions are basic and fundamental rights.

2. Florida law and the weight of authority. The Florida courts have repeatedly followed the federal view on questions concerning search and seizure, with few exceptions, this represents the majority view. Most noteworthy of these exceptions seem to be Florida’s adoption of the “exclusion” rule, and the ruling that a pursued’s state of mind determines whether or not a search has started. Hence the observations made herein of the Florida law are, in almost all cases, applicable to the federal law and the law of a large majority of state jurisdictions.

3. The relation of policy to practice. The following discussion will attempt to demonstrate certain shortcomings in the application of the law of search and seizure. It will attempt to show how specific policies

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88. FLA. CONST. Art. XVI, § 2.
89. In his dissenting opinion in Olmstead v. United States, 277 U.S. 438 (1928), at 478, Justice Brandeis mentions, as some of the forces behind this guarantee, “... the recognition of man’s spiritual nature, ... the right to be left alone ... protection from unjustifiable intrusion ...” For a more detailed treatment of the causes and motivating forces behind such rights, see any of the works cited in note 2 supra.
90. It seems that there is no place in this area of the law where the federal and Florida courts are not in harmony. The aim of the court stated in note 14 supra seems to have been realized. A few examples of the innumerable Florida cases relying in whole or part on federal cases are Perez v. State, Case No. 26,508, Florida Supreme Court, September 21, 1955; Collins v. State, 65 So.2d 61 (Fla. 1953); Diaz v. State, 43 So.2d 13 (Fla. 1949).
91. See CORNELIUS, op. cit. supra note 2; Machen, op. cit. supra note 2.
92. See notes 47 and 48 supra.
93. By holding that the state of mind of the pursued governs the time a search starts (Mitchell v. State, 60 So.2d 726 (Fla. 1952)), the court directly opposes the “Mississippi” view. See Ford v. City of Jackson, 157 Miss. 616, 121 So. 278 (1929).
created the need for and caused the formulation of certain rules; and, how those rules have been subsequently applied without proper regard for the original motivating policies which justify their very existence.

The federal Bill of Rights and the Florida Declaration of Rights prohibit unreasonable searches and seizures.4 Searches based on properly executed warrants are permitted under these provisions5 as are certain exceptional types of searches without warrant.6 Realizing the force and weight of this basic guarantee, it should be obvious that those searches without warrant which are permitted must be justified by some policy which outweighs the policy prohibiting almost all searches without warrant. It is submitted that, though such a consideration was present when those exceptions were formulated, they are, in many instances, applied today without regard to such consideration. Furthermore, when a policy justifies and creates a rule, and that rule is subsequently applied without regard to that policy, such application is unfounded and illogical—perhaps even unconstitutional.

For example, consider the proposition that a search incidental to a valid arrest is constitutional even though effected without a warrant.7 The policy behind this rule is twofold: (1) the likelihood that the arrested party is armed; and, (2) the prospect of the suspect destroying the fruits of the crime which may well be in his possession at the time of the arrest.8 Because of this rationale, an exception was made to the general rule requiring search warrants. Applied to numerous cases of arrest, this exception seems both necessary and desirable. However, is it necessary and desirable when the arrest is for the commission of a traffic violation?9

The accused, arrested for such a violation, sits in his car while the arresting officer inspects both his person and vehicle.10 Obviously, there are no fruits of the crime (i.e., the traffic violation) which the accused could destroy; and, since the accused is in the front seat of the car, the existence of a weapon in the back seat seems immaterial here. Also, common sense dictates that the possibility of the suspect being armed becomes quite remote when the offense is a mere traffic violation.11

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94. See notes 11 and 12 supra.
95. Ibid.
96. See note 60 supra.
97. FLA. STAT. §§ 901.15, 901.21 (1953). See also Mixon v. State, 54 So 2d 190 (Fla. 1951); Diaz v. State, 43 So.2d 13 (Fla. 1949).
99. Such procedure is sanctioned by FLA. STAT. § 901.21 (1953).
100. E.g., Kneemer v. State, 60 So.2d 615 (Fla. 1952).
101. This conclusion becomes more obvious when it is realized that "any traffic violation" could include such offenses as driving with a defective headlight, double parking, possibly even an overdue inspection sticker.
And yet, federal and Florida courts indiscriminately apply the search incidental to arrest doctrine to such cases, apparently oblivious to the complete lack of logical foundation of such application.102

Another example defying basic principles of logic may be found by examining the very basis for the exceptional status of the automobile, and comparing that basis with subsequent decision. Since it is often impractical to secure a warrant for the search of a moving vehicle, an automobile may be searched without a warrant if that search is based on probable cause.103 Yet, despite this sound basis for this exception to the general rule requiring search warrants, Florida and federal courts have held that a search without warrant but based on probable cause was valid even though there was sufficient time and opportunity in which to secure a warrant.104 Though a recent Florida case expressed a contrary point of view,105 this rule seems to be the accepted Florida and federal view.

Finally, let us examine the necessity for a relation between the offense which was the basis of the arrest, and the offense of which defendant is finally convicted. The logic mentioned above would demand such a relation.106 However, though the Florida courts have refused to decide this question,107 it is probable that they will concur with the majority of jurisdictions108 and declare such a relation to be unnecessary.109

Thus, we find that rules founded on sound logic and theory are often applied where that logic and theory are not applicable. We see that the policy motivating certain rules is often ignored, which has resulted in those rules changing from well-founded, flexible tools of justice to unfounded, inexorable weapons of conviction. These conclusions cast serious doubts on the reasoning employed by the courts in many of their decisions.

4. Bases of decision. Freedom from unreasonable search and seizure is a basic right; it is one of the essential safeguards of a free people.110 It appears that the courts are hesitant to give sufficient weight to this right. Few decisions are based primarily on the right to be free from unreasonable

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106. If a search incidental to arrest but without warrant is permitted due to certain policy considerations, can such a search be justified when it does not further these policies? See notes 94 through 102 supra and the related text.
108. E.g., Smith v. State, 215 Ind. 629, 21 N.E. 2d 709 (1939); Ginter v. Commonwealth, 262 S.W.2d 178 (Ky. 1953); Williams v. State, 216 Miss. 158, 61 So.2d 793 (1951); King v. State, 73 Okla. Cr. 404, 121 P.2d 1017 (1942); State v. McKindel, 148 Wash. 237, 238 Pac. 593 (1928).
109. It seems that, if the court believed such a relation to be necessary, Fla. Stat. § 901.21 (1953) would have been declared unconstitutional or the cases cited in note 67 supra would have been decided on that basis.
110. See notes 14 and 73 supra.
searches and seizures. Rather, the court seems prone to debate, at great length, the existence of a traffic violation, the validity of an arrest, when a search starts, or similar factors which, though relevant, should be secondary in importance to a right so fundamental.111

Although any of these factors might be used in determining the legality of a search, no one or combination of these factors is the basis of the right; they are no more than mere aids to be used in defining this basic right. It appears that, oftimes, the court's major concern is with such artifices which, though providing a convenient and expedient basis for decision, avoid contact with the basic issue.112

The results of the court ought not to be criticized. They have been both equitably and legally sound and the rights guaranteed have been more than adequately protected.113 However, it is urged that the logic and reasoning of the court be sharpened and strengthened. As they exist today, laws prohibiting unreasonable search and seizure, though vigorously enforced, are weak and ill-defined. This situation will exist as long as this right is defined in terms of theories which mention the constitution, but are not dependent upon this supreme law for their validity.

The special concurring opinion of Mr. Justice Barns in the recent Florida case of *Ippolito v. State*114 illustrates the method of decision which seems more desirable in cases of questioned searches and seizures. In one succinct paragraph, this opinion simply and accurately held that, since no warrant had issued and probable cause had not been shown, the questioned search was invalid.115 The majority opinion, in order to reach the same result, found it necessary to spend almost three pages discussing arrest, traffic laws and numerous other facts unrelated to the real issue.116

The bases of decision discussed and criticized above should be avoided for numerous reasons, two of which are made obvious by the foregoing discussion. First, the basic doctrines sought to be protected are weakened due to the confusion and lack of definition which result; and, second, such bases cause the creation of bags of dicta which stifle the basic law and, after fermenting for a suitable period of time, are sometimes mistaken for and quoted as venerable and aged declarations of law.

111. The type of decision here criticized is illustrated by those cases cited in note 67 *supra*. The court seems at no loss for words when, in paragraphs of dicta, the force and weight of this right are discussed (see notes 14 and 73 *supra*). However, dictum is not decision nor can it greatly help in the solution of the problem herein discussed.

112. E.g., see notes 114 through 116 *infra* and the related text.

113. Over two-thirds of the searches reviewed by the Florida Supreme Court in the last five year period were held unconstitutional. A listing of all of these rulings would serve no useful purpose here; suffice it to say that, if there was any reason for declaring a search to be unreasonable, the conviction appealed from was reversed.

114. 80 So 2d 332 (Fla. 1955).

115. Id. at 334.

116. Id. at 332-34.
5. Trends. Though the logic and theory employed by the court might be susceptible to criticism, the resulting decisions have been almost completely consistent. Only one case, Courington v. State,\(^{117}\) seems sufficiently inconsistent with the general patterns of the law to be considered a possible trend.

In this case, the defendant was convicted of the unlawful possession of gambling implements. Vital evidence was obtained from a search of the trunk of the defendant’s car after he was arrested for driving while intoxicated. This search was held to be unconstitutional and the conviction was reversed. The decision\(^{118}\) was based on the following rationale:

We think that under the facts and circumstances of this case, the search of the trunk of appellant’s car was not appropriately incident to making a lawful arrest for driving while intoxicated. Our view is bolstered by the testimony of the deputy which indicates that the search of the trunk would not have been made but for the statements of witnesses relating to appellants putting some papers in the trunk.

In so ruling, it ought well be added that the facts and circumstances here reveal that it was not impractical or impossible for the officer to obtain a search warrant if he obtained sufficient information to justify the issuance of one.\(^{119}\)

By its holding, this opinion adopts a rule which is contrary to the majority and federal view.\(^{120}\) By strong dicta, this opinion attempts to reverse a rule which is well settled Florida and federal law.\(^{121}\) And both these ends are sought to be achieved without the use of one supporting case or authority. The blistering dissent,\(^{122}\) substantiated by past decisions and impressive authority, seems to be more indicative of what the Florida law is.

Although the majority recognizes the individual’s right and protects it with sound logic, the result seems to lead the law further into confusion and to further confound the sincere law enforcement officer. Since there have been no subsequent cases on the rules involved in this decision, and, since the court refrained from specifically reversing any of the existing rulings in conflict with this decision, it is impossible to ascertain the future weight and effect of the Courington case. However, in view of past stability and consistency, it does seem unlikely that the court will depart from the

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117. 74 So.2d 652 (Fla. 1954).
118. Delivered by Milledge, A.J., JJ Terrell, Thomas, Mathews and Hobson concurred.
119. Courington v. State, 74 So.2d 652 (Fla. 1954). With the exception of a brief statement of the facts and the issue, the above is the complete majority opinion.
120. See note 108 supra.
121. See note 104 supra.
122. Courington v. State, 74 So.2d 652, 54-56 (Fla. 1954) (The dissenting Justice was Roberts, C.J.).
strong and widely accepted majority view to adopt a minority "Florida" view.

CONCLUSION

A problem does exist in this area of the law. The guilty must be apprehended and convicted, but such convictions must not be made at the expense of constitutionally guaranteed rights. There is no panacean solution to this problem. An awareness of its existence coupled with careful and thoughtful action by law enforcement officers would be the first step towards an answer. Were the Supreme Court to offer more precisely defined rules, and were the various law enforcement agencies to educate their officers as to the existence and content of these rules, perhaps compliance with the constitutional limitations on search and seizure would be more readily forthcoming.

It should be the aim of courts, enforcement agencies, and enforcement officers to change the now existent mass of principles and ill-defined rules into a practical and functional code which will serve to convict the guilty without the inequity of an incidental violation of anyone's constitutional rights.

RICHARD H. PARKER

123. "Therefore, we must consider two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected . . . . It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which evidence is to be obtained." Ohmstead v. United States, 277 U.S. 438, 470 (1928) (Frankfurter, J., dissenting).