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POLICE OFFICERS' HANDBOOK

ARREST, SEARCH, AND SEIZURE

1973

PART II

Search Without Arrest

Reliance on Official Communications

Informer Search Warrants

Fleming's Notebook...Chapter 85:

The Abortion Decision

Questioning by Private Security Guards

In-Court Identification of Drugs by

Police Officer Not Qualified as Chemist

Prepared under the direction of E. Fleming Mason,
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South Carolina LAW ENFORCEMENT - ^(Educational Television) ~~ETV~~ TRAINING PROGRAM -

POLICE OFFICERS' HANDBOOK -

ARREST, SEARCH, AND SEIZURE,

1973,

PART ~~N~~ 2

By

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Sponsored by

South Carolina Law Enforcement Division
in cooperation with
South Carolina Educational Television Network

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South Carolina Governor, John C. West
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Hon. Frank Eppes
Resident Circuit Judge
Thirteenth Judicial Circuit
State of South Carolina

C O N T E N T S

	Page
Search Before Arrest.....	5 - 7
Search Without Warrant.....	9 - 10
Scope of Search Incident to Arrest.....	11 - 14
Consent Searches.....	15 - 18
Search of Vehicles.....	19 - 23
Comments by Judge Eppes.....	24 - 27
Fleming's Notebook.....	29 - 37
Abortion Decision.....	(31 - 32)
Miranda Warnings - Private Guards.....	(33)
Identification of Marijuana by Police	
Officer Not Qualified as a Chemist.....	(36)

F O R E W O R D

Too often, police officers are led to believe that they must have cause to arrest before they can make a lawful search...of the person or of a motor vehicle. There are rare circumstances in which a building may be searched without a search warrant, but, much more often, searches of persons and motor vehicles in on-the-road situations are permitted under our laws.

Motor vehicles on the road...that is, when they are not in custody of the police...may be moved easily and swiftly, thereby making it impossible for the police to obtain a search warrant and have a reasonable chance of finding contraband or stolen goods they might have good reason to believe are secreted in the vehicle. For this reason, our laws permit search of such motor vehicles in circumstances not permitted when buildings or other fixed units are involved.

This does not mean, of course, that chance searches of on-the-road motor vehicles are lawful! As O. Henry said of the onion, in one of his short stories, the essential ingredient must be a part of the stew! The essential ingredient in on-the-road motor vehicle searches is probable cause, or good reason, to believe that stolen goods or contraband are present.

Hon. Frank Eppes

Resident Circuit Judge

Thirteenth Judicial Circuit

State of South Carolina

SEARCHES BEFORE ARREST

Arrest is not always necessary to justify search of the person or of a place...especially when motor vehicles are involved. It is now well known that frisk searches for weapons are permitted when two circumstances exist:

1. Investigation of a situation is justified.
2. There is reason to believe that the suspect(s) might be armed and dangerous.

Even when the frisk search is not warranted, though, searches might be lawfully conducted in some circumstances that do not include cause for arrest. For example, there has been an armed robbery. The culprits escape in a car. A general description of the car and the robbers in broadcast. A cruising squad car spots a car and occupants meeting the general description and stops the car.

In this situation, it is necessary to arrest the occupants and jail them before the car can be searched? The courts say, "No".

In the circumstances...recent armed robbery, car and occupants meeting general description...a frisk search of the occupants for weapons is called for. After that, a thorough on-the-spot search of the car for evidence should follow. Should the evidence justify arrest of the occupants, an immediate, fair line-up identification at the jail without the necessity of a lawyer being present might be desired, and would be lawful. WARNING: After issuance of an arrest warrant, a lawyer must be present at the line-up unless the right is waived by the defendant(s).

Another example, involving a less serious crime (misdemeanor), might entail radio information from the dispatcher to a squad car that the two men with marijuana cigarettes in their possession have just left a drive-in restaurant proceeding in the general

direction of the squad car. A general description of the men and their car is included. Officers spot the car and stop it. They have no arrest warrant, and the suspected crime is a misdemeanor. They cannot arrest at this point. Is search of the car without a warrant justified? How about occupants?

There is probable cause to believe that there is contraband (marijuana) in the car. In this on-the-road situation, thorough search of both the occupants and the car is justified. This would not be true in the case of a house, apartment, or motel room. It is because the car can be easily and quickly moved...plus the existence of probable cause... that makes this search without a warrant lawful.

NOTES FROM LAW ENFORCEMENT MANUAL

(General Provisions)

SEARCH OF THE PERSON

Although search warrants are ordinarily thought of as being authority to search premises, one can also be obtained to search a person. In most circumstances, searches of the person will be without a warrant, however, the general rule always is IF THERE IS TIME GET A WARRANT. The circumstances under which you would use a warrant is if you had advanced information that a person would be at a certain place at a certain time with items on his person that should be searched for. The rules for executing a search of the person with a warrant are the same as those for searching premises. The search must be reasonable in extent and duration. If a strip search is to be done, it should not be done in public; the person may be detained and brought to a private place for the search.

Searches of body cavities are the most severe invasion of privacy and must be done by a doctor, under sanitary conditions.

SEARCH WITHOUT A WARRANT

There are three instances where a search may be made without a warrant. They are:

1. A search incident to an arrest.
2. Emergency searches.
3. Consent searches.

A SEARCH INCIDENT TO AN ARREST - In order to understand the rules of searching incident to arrest, the reasons for permitting such a search should be understood. The only reasons why a search can be made without warrant incident to a lawful arrest made on probable cause are:

1. TO PROTECT YOURSELF - An officer making an arrest should always search the person arrested for any concealed weapons for the officer's own protection.
2. TO PREVENT ESCAPE - Weapons are also used by a prisoner to escape from an arrest. Along with the usual arrest procedures, a thorough search of the

person should be conducted.

3. TO PREVENT DESTRUCTION OF EVIDENCE - Since at the time of arrest it is quite likely that the individual arrested will attempt to destroy evidence, a search should be conducted to prevent him from doing so.

Example: While on duty in a patrol car, you spot a man driving at a very high speed. You stop the car. May you search the car? Answer: No. The mere fact that a person is speeding does not suggest that there is evidence to be destroyed or that the person will attempt to escape or to create a danger of concealed weapons. IMPORTANT - If, when you stop for speeding you notice that the driver appears to be intoxicated, then you may search the interior of the vehicle for a bottle. On the other hand, if you are speaking to the driver following stopping him for speeding and you see contraband or stolen property in the vehicle, you may arrest the driver and seize the articles incidental to the lawful arrest.

SCOPE OF SEARCH INCIDENT TO ARREST - Since the dangers which permit a search without a warrant (namely protection of yourself and prevention of escape or destruction of evidence) disappear once you have the suspect under total and complete control, the search incident to arrest must be limited both in space and in time.

The space which can be searched includes both the person arrested and the area that is in his immediate control. The courts for some time have not made it clear what immediate control means, however, a recent Supreme Court decision apparently would limit the search to an area from within which a suspect might obtain a weapon or something that could have been used as evidence against him. It would seem that if a person is arrested in an automobile, the interior of the vehicle, but probably not the trunk, would be searchable. If arrested in a home, only the portion of the room into which the subject could reach for a weapon or evidence can be

searched incident to the arrest. Chimel v. California, 23 L Ed. 2d. 685 (1969).

The search incident to arrest is also very sharply limited in time. When searching incident to arrest, the arrest must be made first and the search must be conducted either exactly the same time as the arrest or immediately thereafter.

EMERGENCY SEARCHES - The emergency search comes from what is known as the "hot pursuit" doctrine. This is an exception that should not be relied on heavily. It was illustrated in a recent Supreme Court case, facts of which would be helpful:

In Warden v. Hayden, 387 US 294 (1967), several police officers were called to the scene of an armed robbery that occurred only a short time earlier. The officers were directed to a nearby house, where witnesses had seen the fleeing robber enter only a few minutes earlier. The officers entered the house

searching throughout for the suspect or any weapons which he might reach. An officer found and seized a jacket and trousers of the type the robber was said to have worn in a basement washing machine. A few minutes later the suspect, his weapon and the stolen money were found in an upstairs bedroom.

The Supreme Court upheld the entry of the house without warrant, the search of the washing machine and the seizure of the clothes. The Constitution "did not require police officers to delay in the course of an investigation if to do so would endanger their lives or the lives of others. Speed here was essential and only a thorough search of the house or persons and weapons could have insured that Hayden (the robber) was the only man present and that the police had control of all weapons which could be used against them or to effect an escape." THE EMERGENCY SEARCH DOCTRINE IS TO BE USED ONLY IN AN EMERGENCY. Example: You receive a call on the radio that a taxicab driver has just been beaten and possibly

murdered. You arrive at the scene and two eyewitnesses point to an alleyway where the suspect ran. You call other officers in the area and seal off a three block area. The suspect is spotted in that area after it is sealed off. Can the police begin emergency searches of all houses in the three block area to insure that the suspect does not get away?

Answer: No. The leads are much too general. You could not even obtain a warrant for all the houses in the area since you could describe none of the premises in which the suspect might be hiding with particularity. In the Hayden case above, the witnesses had seen the individual actually enter the house which was searched. Example: You are patrolling in a neighborhood and hear a scream from a house and people gathered there confirm that the scream and gunshots appeared to come from within. Do you have authority under the emergency doctrine to enter and search the house without a warrant? Answer: Yes. Although you are not in hot pursuit of a criminal, it appears from the facts that there is a true

emergency requiring immediate police action. It would be impossible under the circumstances to obtain a warrant.

CONSENT SEARCHES - As is pointed out in the introduction of this section, individuals have a basic right to privacy which prevents use of the police power to search except under certain conditions. A right to privacy can be waived by the consent of the person to be searched or a consent of the person who has control of the premises to be searched. The courts are concerned about having any waiver of a constitutional right subjected to severe tests to be certain that the waiver was understandably, free and voluntarily given and that the person was absolutely clear that he was waiving a right. A court will place upon the prosecution the burden of showing that it was a free, voluntary consent. For these reasons, police should be reluctant to use consent as a means of obtaining incriminating evidence.

If a consent search is to be conducted, the officer should be careful to follow procedures similar to those used when a waiver of the Fifth Amendment right is to be employed. A suggested procedure is:

1. Advise person who is giving consent of the nature of the investigation.
2. Advise person that he has a right under the Fourth Amendment to insist upon a search warrant before giving consent.
3. Advise person that if he consents to search, evidence found may be used against him.
4. Avoid any show of force that could be interpreted to look like coercion.
5. Get consent from the person who has the right to control privacy in the area to be searched. (A wife may not be able to consent to a search of her husband's separate bedroom although she could consent to a search of a bedroom which she shares.)
6. Obtain a written consent if it is possible.

An example of a consent to search form is:

On April 1, 1969, I, Jane Jones, was told by Officer Peter Purple that he was investigating a robbery at a nearby bookshop and that he had information indicating that I was involved and that the books were in my house. He told me that he did not have a search warrant and that under the Fourth Amendment, he could not search without a warrant. He told me that I did not have to consent to permitting him to search and that if he were to search and he found stolen books that he was looking for, that evidence or any other evidence of the crime could be used against me in court.

I told Officer Purple that I did not want him to search my whole house, especially the bedrooms but that he could search in the kitchen and living room and that I freely and voluntarily - knowing my rights under the Fourth Amendment - would waive and consent to a search of my kitchen and living room for the books that he said were stolen.

No threats or promises of any kind have been made to me by Officer Purple.

Signed: Jane Jones

The consent to search, like the consent to waive the Fifth Amendment, can be withdrawn at any time at which point an officer would have to seek a search warrant to continue the search. Example: Upon information giving you suspicion of a larceny, you go to the house of the suspect and say that you are conducting an investigation of a crime and you would like to come in and look around. The person at the house lets you in and tells you to go right ahead. You look in a closet and find the stolen goods that you are looking for. If this a valid search or seizure? Answer: No. The search is likely to be found unreasonable because you failed to explain to the person that he had a right to refuse you permission. This means he did not waive his rights "understandably". The search may also be unreasonable because it was not made clear the area to be searched when consent was given.

SEARCH OF VEHICLES - General search and seizure rules already discussed apply to vehicles. Thus, it is always advisable to obtain a search warrant for the search of a vehicle.

Probable cause is always required to search a vehicle unless it is searched incidental to an arrest of an occupant of the vehicle.

Two exceptional characteristics of vehicles may justify a more lenient attitude by the courts towards searches of vehicles as opposed to searches of fixed premises.

First, the vehicles themselves may be either contraband, fruits of a crime, instrumentalities, other evidence of a crime, or a combination of any of these. Example: (1) A car used to transport contraband, i.e., narcotics, may also be treated as contraband. (2) A stolen car may be the fruits of a crime, and, if used as a getaway car in a robbery, it may be an instrumentality of that crime.

In these cases, it is seizable either as contraband under Example (1), or on a plain view theory as long as there is probable cause to identify the vehicle as the fruit, instrumentality, or other evidence of a crime.

In any of these cases, the vehicle may be seized and impounded. Since there is no danger that the impounded vehicle will be tampered with, it is advised that a warrant be obtained for any further search of the interior of the vehicle.

Second, the courts have realized that due to the mobile nature of vehicles, the officer generally has less chance to obtain a warrant. Thus, if there are sufficient facts to establish probable cause to search a vehicle, the courts will be more willing to uphold a warrantless search, but again, if there is in fact time to obtain a warrant, get it.

Note, if you have impounded a vehicle, it is

proper to enter and inventory the property contained therein to protect against false claims by the owner for loss of his property.

Example: you see a Mercedes Benz swerving back and forth on the road. You stop the car since it appears the driver is having some difficulty. Do you have the right to search the car? Answer: No. The fact that the car was swerving does not constitute probable cause to search the car or driver. EXAMPLE CONTINUED: In the example above, you walk up to the Mercedes, you notice that the car is neat and clean but the operator is wearing rumpled old clothes, has dirty fingernails and mussed long hair and a beard. Can you now search the automobile? Answer: No. The mere fact the driver looks different than what you would expect may raise some suspicion but does not constitute probable cause either for an arrest or a search.

EXAMPLE CONTINUED: You ask the driver for identification. His name is the same as the name of the person whom is reliable informant of yours mentioned as having personally bragged to your informant about his prowess in poaching at least one deer a week. Do you have probable cause to search the car? Answer: No. Your information comes from a reliable source who has personal knowledge of the situation, but, the information does not relate to a specific criminal act which has occurred recently enough to justify a belief that evidence of the crime will still be in the vehicle.

EXAMPLE CONTINUED: You see a flashlight in plain view in the vehicle. As you check the rear license plate against the registration number, you see fresh blood and matted hair on the trunk lock. The hair looks like deer hair. Deer season has been closed for two months. Can you now search the car? Answer: Yes. The combination of the information from your informant, plus the blood and hair and flashlight establishes sufficient probable cause to

believe that a deer has recently been taken illegally and that evidence of the crime may be in the vehicle.

Since you have no grounds to otherwise arrest the driver and impound the vehicle, you probably would not have time to obtain a warrant before the evidence could be disposed of. Therefore, it is proper to search the vehicle immediately without a warrant even if the driver refuses your prior request for consent to search.

COMMENTS BY HONORABLE FRANK EPPES,

ETV SHOW, FEBRUARY 1973

SEARCH WITHOUT ARREST

"Too often, police officers are led to believe that they must have cause to arrest before they can make a lawful search. Searches of persons and motor vehicles in on-the-road situations are permitted without arrest when there is probable cause to believe that contraband or stolen property is present."

ARREST OF FELON

WITHOUT WARRANT

"Any felon, whether the crime was committed in this State or another state, may be arrested without a warrant by a South Carolina police officer who has probable cause to believe he is the wanted felon."

ACTING UPON POLICE

REPORTS FROM OTHER AGENCIES

"Police officers may act upon official communications, not only from their own departments, but also from police agencies of other cities and counties, and from those of other states and the Federal agencies." (Speaking of wanted felons)

RIGHT TO MAKE WEAPONS SEARCHES

"The right to make a frisk search for weapons does not depend upon an arrest. (If) the police have information to justify an investigation, and also have good reason to believe the suspects might be armed, they have every right to make a frisk search for weapons, although the suspect is not under arrest."

SEARCH OF AUTOMOBILE

WHEN DRIVER NOT UNDER ARREST

(Speaking of search of auto on-the-road when driver not under arrest.) "The important question is whether or not the searching officers have enough information to make it reasonable to believe that contraband is, in fact, concealed in the motor vehicle."

WARRANT FOR DRUGS

"It is well known (in police circles) that when you have marijuana (in group use) you usually have other drugs. Sometimes LSD...more often Heroin... frequently other drugs...on the premises! With this fact in mind, information that marijuana will be used ...by a group at a specified time and place...is enough probable cause to justify the issuance of a search warrant for 'marijuana and other unlawful drugs'."

RULE FOR INFORMER AFFIDAVITS

"Step I on Informer affidavits is, 'why is the informer thought to be reliable?'; step II is, 'how did the informer get his information?'"

FLEMING'S NOTEBOOK!



FLEMING'S NOTEBOOK...Chapter 85:

FINGERNAIL SCRAPINGS

A suspect of murder was at the police station with his attorney at the request of police to discuss the murder of the suspect's wife...he was not under arrest, having come in to the station-house voluntarily. Police asked for fingernail scrapings...the suspect refused. Scrapings were taken forcibly, supplying evidence to be used at trial.

Question: Was forcible act of obtaining fingernail scrapings illegal? Ruling: Suspect was not under arrest, so forcible seizure of scrapings constituted an illegal search and seizure. Evidence thereby obtained could never be used at any trial of the suspect!

If the suspect had been under arrest for the murder, the search and seizure would have been legal.

Had there been probable cause to believe the suspected scrapings existed under the suspects' fingernails, a search warrant could have been obtained, and the search would have been legal even when the suspect was not under arrest.

Reference: Murphy v. Cupp, 461 F 2d 1006, Ore.

FRISK SEARCH...FLEEING SUSPECT

In a 'high-crime' area, four youths were observed by police running from a drug store...they did not heed 'stop' warnings by police...one youth was caught and searched for weapons! A pistol and ammunition were found. Court ruling: The search for weapons was lawful. Reasons: High-crime area, act of running from store, refusal to stop.

Reference: US v. Rundle, 461 F 2d 860.

AIRLINE SEARCH

Baggage of airline passenger was searched for dangerous plants...marijuana was found. Court ruling: Evidence was admissable, because warrantless search was legal, and marijuana was found in process of a legal search. See US v. Shafer, 461 F 2d 856.

ABORTION DECISION

The United States Supreme Court has thrown out the abortion laws of most of the states...including South Carolina's laws on abortion.

The Roe case lays down these rules:

1. Abortions under three months may not be prohibited by state law, so long as the prospective mother and her doctor agree that the operation is to be performed.

2. Abortions involving pregnancies of 3 - 7 months may not be prohibited by state law, but a state may prescribe the conditions under which the operation may be performed...such as, requiring that the operation must be performed by a licensed physician in a hospital or clinic.

3. Abortions after seven months may be prohibited by state law...unless there is medical evidence that the mother's life would be endangered by failure to have it performed.

From a review of South Carolina's laws relating to abortion, it appears to the Editor of this 'Note-book' that this State must have a new law if abortions in this State are to be controlled to the extent permitted by the Roe decision!

MIRANDA WARNINGS

IRS agent went to home of suspected income tax violator, identified himself, and questioned the suspect about tax matters...no MIRANDA warnings. Statements of suspect were admitted in evidence against him for tax fraud. Ruling of Federal Courts: Statements were admissable, even tho no MIRANDA warnings were given...because suspect was not under arrest. US v. Engle, 458 F 2d 1017.

MIRANDA - PRIVATE GUARDS

Customer was detained by store private security guard...no MIRANDA warnings! Ruling: MIRANDA warnings are not required when questioning is done by private security guards who are not police officers! US v. Bolden, 461 F 2d 998.

WEAPONS FRISK NOT LAWFUL

Police stopped a car for a defective muffler... a passenger could furnish no identification...as a result, he was frisked for weapons! Counterfeit money was found. Question 1: Was the search legal? Answer: No! A defective muffler plus lack of identification on the part of a passenger does not create a dangerous situation justifying any type of search! Question 2: Should the counterfeit money be returned to the defendant, since it was seized in an illegal search? Answer: No! It is illegal to possess counterfeit money. It should be delivered to Treasury Agents.

ARREST WARRANT NOT IN POSSESSION

FBI had arrest warrant for bank robbery, but it was at headquarters when agents went to arrest defendant! Arrest was OK since felony was involved. US v. Leftwich, 461 F 2d 586.

FORCIBLE ENTRY WITHOUT KNOCKING

A brownshirted man snatched a pocketbook and fled...he was traced by several eyewitnesses to his house, although police had not seen him at all. Police arrived a few minutes later and made forcible entry to house. Federal Court Ruling: Circumstances made this a situation of 'hot pursuit', even tho the officers themselves had not seen the culprit, and forcible entry without knocking and without a warrant was lawful. Washington v. US, 414 F 2d 1122.

ARREST ON SUSPICION

Truck suspected of carrying marijuana was stopped ...no probable cause. Driver had license and proper vehicle papers. Driver was nevertheless ordered to follow police car to station-house. On the way, he was seen to throw package out of car window. Marijuana! Court ruling: Recovery of evidence by the officers was the result (fruit) of an illegal

arrest...and was inadmissible against the driver.

US v. Borcich, 460 F 2d 1391.

RIGHT TO PRESENCE OF LAWYER

AT PRE-TRIAL PHOTO IDENTIFICATION

There is no requirement that a lawyer be present at a photo identification session! US v. Ballard, 423 F 2d 127. True, even after arrest. US v. Anderson, 461 F2d 739.

IDENTIFICATION OF MARIJUANA

BY POLICE OFFICER NOT QUALIFIED

AS A CHEMIST

Identification in court of substance as marijuana by police officer (not a chemist) from knowledge gained from experience as a police officer was OK in Federal criminal trial. US v. Aldama-Aldama, 462 F 2d 952. This might be of great value when SLED lab agents are not available for preliminary hearings! Or even at trials?!

POLICE QUESTIONING OF PRISONER
WITHOUT PRESENCE OF KNOWN COUNSEL

Even if police are aware that defendant in custody has a lawyer, the defendant may waive the right to have such counsel present during questioning. US v. Zamora, 460 F 2d 1272.

VERBAL WAIVER OF RIGHTS

Even tho a defendant has refused to sign a written waiver, a later verbal waiver is lawful. US v. Devall, 462 F 2d 137.

SEARCH INCIDENT-TO-ARREST
MADE AT STATION-HOUSE

A defendant was arrested for disorderly conduct, but was not searched until he reached the jail, where marijuana was found on his person. Evidence admissible, said Federal Court. Wright v. Edwards, 343 FS 792.

STATEWIDE LAW ENFORCEMENT EDUCATION

THROUGH TELEVISION

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