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## SEARCHES AND SEIZURES IN THE ADMINISTRATION OF THE CRIMINAL LAW OF INDIANA

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There is no single subject related to the administration of the criminal law in Indiana that is brought to the consideration of our courts as much in recent times as that of searches and seizures. This was to be expected under a policy of enforcing universal abstention from the use of intoxicating liquors for beverage purposes by law and by law enforcement officers.

In general, it is conceded by all that the state has the right, through its officers, to make reasonable searches and seizures in aid of the enforcement of the criminal code; also that the individual has the right to be secure against unreasonable searches and seizures. But there is not always unanimity of view on questions of whether given searches and seizures are reasonable or unreasonable; or on questions of whether given search warrants are valid or invalid; or on questions of admissibility or inadmissibility in evidence of information and of articles procured through given searches and seizures.

The conflict between concepts of the right of the state to make reasonable searches and seizures on one side, and concepts of the right of the individual to be secure against unreasonable searches and seizures on the other side is indeed conducive to much litigation. The reasons for wide differences in these concepts are several. Whatever the reasons for these clashing views may be, they are being presented in thousands of cases annually in our lower courts, and in scores of cases appealed to the Supreme Court of our state. The decisions of this court on the subject have nearly all been rendered in the past two or three years.

These observations will be confined to the constitutional and statutory provisions of this state on the subject and to their interpretation and application by the Supreme Court of Indiana.

### CONSTITUTIONAL PROVISION

The provision in our state constitution<sup>1</sup> is,

"The right of the people to be secure in their persons, houses papers and effects against unreasonable search and seizure shall

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\* See biographical note p. 83.

<sup>1</sup> Sec. 11, Art. I, Const. of Indiana.

not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

The right which the people thus guaranteed to themselves against themselves was not a new right but is only the expression of the right claimed at common law.<sup>2</sup> It might seem that a politically free people which held to rights of individual freedom such as that stated in Section 11 of the Bill of Rights, would not have considered it necessary to guarantee this right against themselves in the formation of a representative government under which sovereignty rested in themselves. But they were apparently apprehensive that power, by whomever exercised, under whatever theory or form of government, might at times be exercised arbitrarily, and therefore they guaranteed the continued existence of this and other fundamental rights and thereby inhibited their representatives in government against their abridgement.

It is obvious that the concept of individual freedom which is expressed in the constitutional provision against unreasonable searches and seizures was something definite and fixed and well understood. There was no dispute or debate in the constitutional convention over the meaning of the language used.

The same right is expressed in most of the various state constitutions and in the federal constitution. It is, of course, obvious that the purpose was not to afford a shield to the guilty. The purpose was only to guard against unreasonable searches and seizures, such as were sometimes experienced in England under the general warrants of search and seizure. The continued existence of the right depends on its enforcement whenever violated, and it may occur that a guilty person occasionally benefits from its enforcement, but if that occurs it is an inescapable incident to the preservation of the right to the people generally rather than an object or purpose of the right or of its enforcement.

#### SEARCHES AND SEIZURES WITHOUT PROCESS OF WARRANT

The most controversial question arising from the language used in Sec. 11 of the Bill of Rights is over the meaning of the term "unreasonable." There is no inhibition against searches and seizures without process of warrant, except against those which are unreasonable. These controversies arise most frequently in connection with searches of automobiles for intoxicating liquors. The right exists to search a person, and within limits, his property, without process of search warrant, when under lawful arrest.

The Supreme Court of Indiana has recognized this right on the part of the state. Thus, it has been held<sup>3</sup> that a person lawfully

<sup>2</sup> *Cary et al v. Sheets*, 67 Ind. 375, 577.

<sup>3</sup> *Jameson v. State*, Ind. 149 N. E. 51 *Haverstick v. State*, Ind. 147 N. E. 625.

arrested for driving an automobile at an unlawful rate of speed could not complain that the search of his automobile and of packages in the automobile without a search warrant, was unreasonable, and intoxicating liquor seized under such search was held admissible in evidence in the trial of the charge of unlawful transportation of intoxicating liquor.

Arrests are sometimes made without warrant and the validity of searches and seizures made pursuant to such arrests is brought in question. An officer can always make an arrest when either a misdemeanor or a felony is committed in his view. A lawful arrest may be made without a warrant on information that a felony has been committed. The driver of an automobile may be arrested without a warrant upon information that he has committed the felony of transporting liquor; and, in such a case, it has been held that the search of the automobile could be lawfully made without a search warrant.<sup>4</sup> In this case, the automobile containing the liquor had temporarily come to rest.

One who is arrested by a policeman for violating a traffic regulation in the operation of an automobile and who voluntarily discloses that he has liquor in the automobile cannot complain of a search of the automobile without a search warrant and cannot successfully object to the introduction of evidence thus procured in a trial on a charge of unlawfully transporting liquor.<sup>5</sup>

But an officer can only make a lawful arrest for the commission of a misdemeanor when it is committed in his view. Police officers have no authority, in view of Section 11 of Article 1 of the Constitution, to break into and search private rooms without a warrant for the mere purpose of discovering evidence that a misdemeanor has been, or is being, committed, or of arresting a person suspected of committing one.<sup>6</sup>

No authority exists to make searches and seizures without search warrants for the purpose of discovering evidence of whether the law is being violated. The case just referred to so holds. The Supreme Court recently held<sup>7</sup> the search of a man's house unlawful, and the evidence procured inadmissible, where it appeared that certain officers, acting under a search warrant for the search of the premises of another found nothing and then without any other warrant proceeded "to search the neighborhood" and without prior information that the law was being violated entered the premises of the defendant and forced their way into the house to learn what, if anything, they could find.

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<sup>4</sup> *Budreau v. State*, Ind. 149 N. E. 442.

<sup>5</sup> *Berry v. State*, Ind. Cause No. 24,737, Jan. 26, 1926.

<sup>6</sup> *Hart v. State*, 145 N. E. 492.

<sup>7</sup> *Dumas v. State*, Ind. 150 N. E. 24.

There is, under some circumstances, authority in officers to make arrests and searches and seizures without warrants for either, when there is probable cause for believing that the law is being violated. What constitutes such probable cause always depends on the facts. The facts must be such as to furnish reasonable cause for believing that the law is being violated and the officers must act on such belief.<sup>8</sup>

In a case decided by the Supreme Court in March of this year<sup>9</sup> it was held that probable cause existed for believing that liquor was being unlawfully transported and a search made on such belief was not unreasonable. In this case the evidence disclosed that officers, acting upon information that liquor was about to be taken to a certain place, went and hid in a shed on the place in which many empty cans were found which had contained "mule." Presently the defendant drove up to the place in an automobile, stopped, raised up a lid in the back of the car and, in view of the officers, raised a five gallon container like those in the shed. Hearing the officers coming, the defendant placed the container back and locked the part of the car in which it was placed. The defendant was then arrested and the officer unlocked the car and took out the container which was full of alcohol.

A search is unreasonable and unlawful, however, when probable cause does not exist and officers act only on suspicion or on a "dragnet" plan for the purpose of ascertaining whether the law is being violated, and the evidence thus procured is not admissible. Thus, it was recently held<sup>10</sup> that the statement of a searching officer that the defendant was a known "bootlegger" was not sufficient to show probable cause that the defendant was unlawfully transporting liquor in his automobile.

So, too, the stopping and searching of an automobile on a public highway where not even a suspicion of law violation existed prior to the attempt to search was held unreasonable and unlawful.<sup>11</sup>

Another case of this character was decided similarly recently. The evidence showed that two deputy sheriffs and two policemen, while driving in an automobile on a highway just after dark, saw the light of an approaching automobile one-fourth mile away. The officers dimmed their lights and the approaching driver responded by doing the same and both drivers dimmed their lights the second time. As the cars came to the point of passing each other, one officer jumped out and ordered the defendant to stop his car, which was occupied by the defendant and his wife. The officers then commanded the man and his wife to alight and then proceeded to search the car.<sup>12</sup>

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<sup>8</sup> *Eiler v. State*, Ind. 149 N. E. 62; *Robinson v. State*, Ind. 149 N. E. 891; *Batts v. State*, Ind. 144 N. E. 22.

<sup>9</sup> *Thomas v. State*, Ind. 146 N. E. 850.

<sup>10</sup> *Robinson v. State*, Ind. 149 N. E. 491.

<sup>11</sup> *Batts v. State*, Ind. 144 N. E. 22.

<sup>12</sup> *Eiler v. State*, Ind. 149 N. E. 62.

The right to search premises, other than automobiles, without a search warrant has been sustained under the following circumstances; the premises consisted of a cleared patch of ground 15x20 feet in dimension on the bank of a river and which was occupied by the defendants as a fishing camp; it appeared that the officers gained entrance from the surrounding land, of which the cleared patch was a part, by permission of the owner; and that the officers, while near the patch, had a reasonably plain view of a still in operation on the premises.<sup>13</sup>

The only case decided by the Supreme Court of Indiana relative to the search of a dwelling house without a search warrant, and without invitation to search, is that of *Dumas v. State*.<sup>14</sup> In that case, it was held that the search was unlawful. There the officers had not even a suspicion of any violation before they entered the premises on which the house was situate, but they testified that as they approached the house they smelled evidence of a still in operation.

It is to be expected that in case of a search of a dwelling without the lawful arrest of the occupant on the premises and without a search warrant and in the absence of an invitation to search, great care, to say the least, would be exercised by the courts before such a search would be held lawful, if at all.

In a recent case before the Supreme Court of the United States a man was arrested several blocks away from his dwelling which was searched after the arrest without authority of a warrant. The Court held that the search of the dwelling without a search warrant was under the circumstances unreasonable and unlawful and was, in itself abhorrent to our laws.<sup>15</sup>

If there is an invitation to search premises the unreasonableness or unlawfulness of the search cannot afterwards be asserted. What constitutes an invitation to search is not always easy to determine. In a case where the defendant told an officer, who had entered his bar-room without a search warrant, "go ahead and search," it was held that the evidence procured was admissible and that its admissibility was not necessarily determined by the fact that it was seized while the defendant committed the crime of violating the prohibition law in their presence since he told them to search.<sup>16</sup> But in the case of *Meno v. State*<sup>17</sup> (1925), it was held that the statement of the occupant of a building to an officer that he might search the building is not an invitation to search when the officer exhibits a search warrant. Consent to search is co-ercive under such circumstances.

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<sup>13</sup> *Sade and Bingham v. State*, Ind. 150 N. 1. 24.

<sup>14</sup> *Dumas v. State*, Ind. 149 N. E. 24.

<sup>15</sup> *Agnelol et al v. U. S.*, Vol. 46 Sup. Ct., Rep. 4.

<sup>16</sup> *Hess v. State*, 192 Ind. 50.

<sup>17</sup> *Meno v. State*, Ind. 148 N. E. 420.

## SEARCH AND SEIZURE BY PROCESS OF WARRANT

Searches and seizures by authority of search warrants are forbidden in the constitution unless such warrants are issued upon probable cause, supported by oath or affirmation, and unless they particularly describe the place to be searched and the person or thing to be seized.

The most general statute relating to the issuance of search warrants that is in force in this state is the Act of 1905<sup>18</sup> which authorizes justices of the peace to issue warrants to search any house or place for a variety of named articles under the various circumstances named in the act.

Provision is also made in particular criminal statutes for the issuance of such warrants, as for example in the prohibition act<sup>19</sup> now in force in this state, which provides that:

"If any person shall make an affidavit before any mayor, justice of the peace, or judge of any court that such affiant has reason to believe and does believe that on any described or designated premises or tract of land, there is intoxicating liquor or a still or distilling apparatus which is being sold, bartered, used, or given away, or possessed, in violation of the laws of this state, such justice of the peace, mayor or judge shall issue his warrant to any officer having power to serve criminal processes, and cause the premises designated in such affidavit to be searched as in other cases where such warrants are issued as now provided by law."

A similar provision existed in the original prohibition act of 1917.<sup>20</sup>

It has been held<sup>21</sup> that the language "make an affidavit before any mayor," etc., must be construed with the provisions in the general Act of 1905<sup>22</sup> and of an Act of 1907,<sup>23</sup> which are to the effect that no warrant for search shall be issued until there has been filed with the issuing officer an affidavit describing the house or place to be searched, the things to be searched for and alleging substantially the offense in relation thereto, and that the affiant believes and has good cause to believe that such things as are to be searched for are there concealed and, if search is under the liquor statute, that they are kept for unlawful purposes. And it was held in the same case that when so construed the provision for making an affidavit before a mayor, etc., does not conflict with Section 11 of Article I of the Constitution. In the same case, it was also held that the affidavit on which the warrant issued must be filed before the warrant is issued and that there is no filing unless the affidavit is delivered to the proper officer for the purpose of being kept on file by him in the proper place. In that case, the clerk of the court was the proper officer to receive the affidavit

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<sup>18</sup> Sec. 2085 Burns' Ann. Stat. 1926.

<sup>19</sup> Chapter 48, Acts 1925.

<sup>20</sup> Chapter 4, Acts 1917.

<sup>21</sup> *Thompson v. State*, 190 Ind. 363.

<sup>22</sup> Sec. 2085 Burns' Ann. Stat. 1926.

<sup>23</sup> Sec. 8340, Burns' R. S. 1914.

for filing and the failure to so file it with him invalidated the search warrant and the proceedings thereunder.

But the recording of the filing of such affidavit is not essential to the validity of the search warrant issued thereon if, with the purpose to file it, the affidavit is deposited with the officer charged with the duty to receive and place it on file and is received and retained by him for that purpose.<sup>24</sup>

Strict compliance with all formalities for the issuance and execution of search warrants is required. Thus, it has been held, the description of the premises to be searched in an affidavit for a search warrant must be so specific as to leave no discretion to the officer as to what place he is to search, but must fully direct him to the particular premises.<sup>25</sup> In the case just referred to, a description, *viz*: "See D, Beech Grove, Section 21, Township 15 north, Range 4 east, in the City of Indianapolis, Marion County, Indiana," was held insufficient.

So, too, a description, *viz*: "Residence and all outbuildings located on Grants 31 and 32, near Deadman's Hollow in the township of Jeffersonville, of said county and state" was held insufficient.<sup>26</sup>

But the description of premises as "No. 116 East Ohio Street, Indianapolis, Ind." was held sufficient to authorize a search of a building at 114 East Ohio Street which connected with the one known as No. 116.<sup>27</sup> The evidence showed that the building at No. 114 was connected with that at 116 by a hallway, was in the exclusive possession of the defendant who was in possession of the one at No. 116, and that it was so connected as to be a part of No. 116, reachable only by means of the entrance to No. 116 East Ohio Street. Other cases have been decided on the question of sufficiency of description, but those referred to are illustrative of how the rule is applied. The certainty of description required for a deed of conveyance is sufficient in a search warrant.<sup>28</sup>

The affidavit for a search warrant need not state the name of the person whose premises are to be searched—it is sufficient if it describes the articles which are to be seized and states that they are kept by a person or persons unknown.<sup>29</sup>

A search warrant is not invalid by reason of the omission of the seal of the justice of the peace who issued it from the jurat to the affidavit on which it was issued.<sup>30</sup>

The office of a search warrant is not to authorize a search for the purpose of discovering or procuring evidence on which to base a

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<sup>24</sup> *Morgan v. State*, 194 Ind. 39.

<sup>25</sup> *Flum v. State*, 193 Ind. 585.

<sup>26</sup> *Phipps v. State*, Ind. 143 N. E. 287.

<sup>27</sup> *Donnelly v. State*, Ind. 144 N. E. 472.

<sup>28</sup> *Rose v. State*, 171 Ind. 602.

<sup>29</sup> *Boyd v. State*, Ind. 143 N. E. 355; *Thompson v. State*, Ind., 147 N. E. 778.

<sup>30</sup> *Stapert v. State*, Ind. 143 N. E. 587.



prosecution. There must be probable cause for believing that the law is being violated and that the articles sought are on the premises to be searched, and all this must appear in an affidavit which must be filed before the warrant may issue.<sup>31</sup> Search warrants are available only to the state in aid of enforcement of the criminal law.<sup>32</sup> Information gained pursuant to the execution of a valid search warrant is, of course, admissible in evidence to prove that an offense has been committed.

The legislature has provided that the probable cause contemplated by Section 11 of Article I of the Constitution may be shown by affidavit made on information and belief. It has been held that this statutory provision does not violate the said section, and a warrant issued upon such an affidavit is valid.<sup>33</sup>

Only one search of premises described in a search warrant can be made under such warrant, and if used again any information gained as a result of such subsequent search is inadmissible.<sup>34</sup>

#### EXCLUSION OF EVIDENCE PROCURED UNDER UNLAWFUL SEARCH

The courts of appeal generally hold that information acquired and articles seized in the course of an unlawful search are not admissible in evidence in the trial of one whose person or premises have thus been searched.

The burden is, however, on the defendant to show the unlawfulness of the search and seizure. And failure to object to the admission in evidence of such information or articles constitutes a waiver.<sup>35</sup>

The affidavit for a search warrant and the warrant itself need not be introduced in evidence to render liquors seized admissible in evidence when there is no objection to oral testimony that the officer had a search warrant and seized the liquor in the execution of the warrant.<sup>36</sup>

The right to object to such evidence does not, however, extend to one who had no interest in the premises searched, though searched unlawfully.<sup>37</sup>

#### CONCLUSION

It is obvious that there will be many questions presented for decision to our Supreme Court which have thus far not been decided. But enough has been decided so that everyone may fairly well know the limits of authority to make searches and seizures and what the

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<sup>31</sup> *Calender v. State*, 193 Ind. 91.

<sup>32</sup> *State v. Derry*, 171 Ind. 18, 24.

<sup>33</sup> *Rose v. State*, 171 Ind. 18, 24.

<sup>34</sup> *McDaniel v. State*, Ind. Cause No. 24,379, Jan. 6, 1926.

<sup>35</sup> *Burgess v. State*, 194 Ind. 406.

<sup>36</sup> *Post v. State*, Ind. Cause No. 24,824, Jan. 13, 1925.

<sup>37</sup> *Walker v. State*, 194 Ind. 420; *Snedegar v. State*, Ind. 146 N. E. 487; *Hines v. State*, Ind. Cause No. 24,860, Feb. 2, 1926.

rights of the individual are. The Supreme Court of our state has, throughout its existence, preserved to the people the right guaranteed in Section 11 of the Bill of Rights without derogation on the right of the state to make such reasonable searches and seizures as are necessary to a proper enforcement of the laws. In so doing it has performed well one of its highest duties.