University of Arkansas at Little Rock Law Review

Volume 4 | Issue 1 Article 5

1981

Criminal Law–Searches and Seizures–Individualized Probable Cause Is Necessary to Search Persons Incidentally on Premises Subject to a Warrant Authorized Search

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CRIMINAL LAW—SEARCHES AND SEIZURES—INDIVIDUALIZED PROBABLE CAUSE IS NECESSARY TO SEARCH PERSONS INCIDENTALLY ON PREMISES SUBJECTED TO A WARRANT AUTHORIZED SEARCH. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

A valid search warrant, issued by a judge of an Illinois circuit court, authorized a search of the Aurora Tap Tavern and of the person of the bartender for narcotics and related paraphenalia. In the process of executing the warrant, the police frisked each of the twelve customers present, including appellant Ybarra. While frisking Ybarra, an officer felt what he described as a "cigarette pack with objects in it." The pack was not removed from Ybarra's pocket until all of the customers were frisked. The officer then returned to Ybarra, looked inside the cigarette pack, and found six tinfoil packets containing heroin.

Ybarra was indicted by a grand jury for possession of a controlled substance. His motion to suppress the heroin was denied on the basis of an Illinois statute which authorizes the search of persons found on premises described in a search warrant when the person executing the warrant has a reasonable suspicion of (1) an impending assault or (2) destruction or concealment of items described in the warrant.[1]

The Appellate Court of Illinois affirmed Ybarra's conviction and the denial of his motion to suppress the heroin.[2] The court found that the statute was not unconstitutional in its application to the facts of this case because the complaint for the warrant indicated that heroin was being sold or dispensed in the tavern, and therefore, the patrons were implicated in the heroin traffic and had opportunity to conceal heroin when the warrant was executed.[3]

The Illinois Supreme Court denied Ybarra's petition for leave to appeal and the United States Supreme Court granted certiorari.[4]

1. ILL. REV. STAT. ch. 38, ¶ 108-9 (Smith-Hurd 1980), provides in full:

In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

(a) To protect himself from attack, or

(b) To prevent the disposal or concealment of any instruments, articles, or things particularly described in the warrant.

2. People v. Ybarra, 58 Ill. App. 3d 57, 373 N.E.2d 1013 (1978).

3. *Id.* at 1016-17.

4. Ybarra v. Illinois, 440 U.S. 970 (1979).

The Court held that the search of Ybarra contravened the fourth and fourteenth amendments because the officer had neither probable cause to believe that Ybarra was concealing contraband nor reasonable suspicion that Ybarra was armed and dangerous. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

The traditional standard for searches is probable cause to believe that seizable items are in a particular place.[5] Warrants are usually required;[6] however, the criterion for determining probable cause for a warrant may vary with the type of search involved.[7] Warrants must specify the place to be searched and the person or property to be seized.[8] Moreover, police may not seize one thing under the authority of a warrant describing another item.[9]

The general warrant requirement is subject to several specific exceptions. A warrant is not required for a search incident to an arrest,[10] a search conducted during hot pursuit of a fleeing felon,[11] or a search of a movable vehicle where probable cause exists to believe that the vehicle contains contraband or instrumentalities of a crime.[12] Nor is a warrant required to seize obvious contraband in plain view of an officer who has an independent right to be in a position to make the physical seizure.[13] A warrantless entry of premises to render apparently necessary emergency assistance is permissible,[14] as is a warrantless search where consent is freely

5. Torres v. Puerto Rico, 442 U.S. 465 (1979).

6. Mincey v. Arizona, 437 U.S. 385 (1978); United States v. Chadwick, 433 U.S. 1 (1977); Katz v. United States, 389 U.S. 347 (1967).

7. Marshall v. Barlow's Inc., 436 U.S. 307 (1978); Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

8. U.S. CONST. amend. IV provides in full:

> 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 person or things to be seized.

See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Berger v. New York, 388 U.S. 41 (1967); Stanford v. Texas, 379 U.S. 476 (1965).

9. Marron v. United States, 275 U.S. 192 (1927).

10. United States v. Edwards, 415 U.S. 800 (1974); Chimel v. California, 395 U.S. 752 (1969).

11. Warden v. Hayden, 387 U.S. 294 (1967).

12. Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

13. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Harris v. United States, 390 U.S. 234 (1968).

14. Mincey v. Arizona, 437 U.S. 385 (1978); Root v. Gauper, 438 F.2d 361 (8th Cir. 1971).

given.[15]

In certain situations where the need to search outweighs the severity of the intrusion, limited searches may be permitted when reasonable suspicion exists, but probable cause does not.[16] A frisk (pat down of outer clothing to detect weapons), for example, is one type of limited search which may be conducted without probable cause to believe that the person frisked presently possesses seizable items.[17] As a prerequisite to a frisk, the officer must have an articulable suspicion that criminal activity is afoot to justify a stop (brief detention).[18] A reasonable suspicion that the person stopped is presently armed and dangerous is then sufficient justification for a frisk.[19] The frisk exception to the traditional probable cause standard has been narrowly construed to require individualized suspicion,[20] and mere proximity to others independently suspected of crime is not an acceptable basis for a frisk.[21]

Prior to *Ybarra*, the United States Supreme Court had not delineated the effect, if any, that a person's presence at the site of a warrant authorized search has on the quantum of individualized suspicion necessary to justify a frisk or a full search of that person. In jurisdictions without statutes which authorize searches of such persons, courts have usually held that if the person is not named in the warrant, a search of that person violates the fourth amendment.[22] Individualized probable cause is usually necessary to search anyone incidentally on the premises,[23] and individualized suspicion

15. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968).

16. For example, limited suspicion searches may be conducted in close proximity to international borders. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brigoni-Ponce, 422 U.S. 873 (1975).

17. Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

18. Delaware v. Prouse, 440 U.S. 648 (1979); Terry v. Ohio, 392 U.S. 1 (1968) (Black, J., concurring).

19. Sibron v. New York, 392 U.S. 40 (1968).

20. Dunnaway v. New York, 442 U.S. 200 (1979); Delaware v. Prouse, 440 U.S. 648 (1979). *See* United States v. Di Re, 332 U.S. 581 (1948).

21. Sibron v. New York, 392 U.S. 40 (1968).

22. Poole v. State, 247 So. 2d 443 (Fla. Dist. Ct. App. 1971); Purkey v. Mabey, 33 Idaho 281, 193 P. 79 (1920); Salmon v. State, 2 Md. App. 513, 235 A.2d 758 (1967); State v. Fox, 283 Minn. 176, 168 N.W.2d 260 (1969); State v. Bradbury, 109 N.H. 105, 243 A.2d 302 (1968); State v. Massie, 95 W. Va. 233, 120 S.E. 514 (1923); State v. Wrest, 190 Wis. 251, 208 N.W. 899 (1926); State v. Jokosh, 181 Wis. 160, 193 N.W. 976 (1923). *Contra*, Colding v. State, 259 Ark. 634, 536 S.W.2d 106 (1976); Samuel v. State, 222 So.2d 3 (Fla. 1969); State v. De Simone, 60 N.J. 319, 288 A.2d 849 (1972).

23. United States v. Festa, 192 F. Supp. 160 (D. Mass. 1960); State v. Nabarra, 55 Hawaii 583, 525 P.2d 573 (1974); State v. Carufel, 106 R.I. 739, 263 A.2d 686 (1970).

is usually required to justify a frisk during a warrant authorized search.[24]

In contrast Arizona,[25] the District of Columbia,[26] Georgia,[27] Illinois,[28] and Kansas[29] have adopted virtually identical statutes which authorize the search of anyone present when a search warrant is executed if the police feel it necessary for self-protection or to prevent concealment or destruction of items described in the warrant. These statutes have been liberally construed to apply to anyone "reasonably connected to the premises."[30] Persons entering the premises during the warrant authorized search may be searched,[31] but those arriving after the search is completed may not.[32] Any search of a person not named in the warrant must be conducted as soon as possible; the police may not wait and then search later.[33]

The five state statutes have expanded the scope of search warrants to include persons not named therein on the basis of two exigencies which the United States Supreme Court has recognized as justifying exceptions to the usual requirement that a person

24. United States v. Miller, 546 F.2d 251 (8th Cir. 1976).

25. ARIZ. REV. STAT. ANN. § 13-3916(E) (1978).

26. D.C. CODE ANN. § 23-524(g) (1973).

27. GA. CODE ANN. § 27-309 (1978).

28. ILL. REV. STAT. ANN. ch. 38, ¶ 108-9 (Smith-Hurd 1980). *See* note 1 *supra* for full text.

29. KAN. STAT. ANN. § 22-2509 (1974).

30. State v. Saiz, 106 Ariz. 352, 476 P.2d 515 (1970); United States v. Graves, 315 A.2d 559 (D.C. 1974); United States v. Miller, 298 A.2d 34 (D.C. 1972); State v. Shope, 147 Ga. App. 119, 248 S.E.2d 188 (1978); Willis v. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970); People v. Dukes, 48 Ill. App. 3d 237, 363 N.E.2d 62 (1977); People v. Kielczynski, 130 Ill. App. 2d 231, 264 N.E.2d 767 (1970); People v. Pugh, 69 Ill. App. 2d 312, 217 N.E.2d 577 (1966); Kansas v. Loudermilk, 208 Kan. 893, 494 P.2d 1174 (1972).

These statutes have even been applied to anyone who happens to be standing in the curtilage of the premises to be searched. State v. McClellan, 215 Kan. 81, 523 P.2d 357 (1974); *cf.* People v. Easterbrook, 43 A.D.2d 719, 350 N.Y.S.2d 442 (1973), *aff'd*, 35 N.Y.2d 913, 324 N.E.2d 367, 364 N.Y.S.2d 899, *cert. denied*, 421 U.S. 965 (1974) (persons searched were leaving apartment building where police were about to execute warrant explicitly authorizing search of anyone found on premises of a particular apartment).

31. People v. Campbell, 67 Ill. App. 3d 745, 385 N.E.2d 168 (1979); People v. Pugh, 69 Ill. App. 2d 312, 217 N.E.2d 557 (1966). *Contra*, Smith v. State, 139 Ga. App. 129, 227 S.E.2d 911 (1976); Wallace v. State, 131 Ga. App. 204, 205 S.E.2d 523 (1974). *See also* Smith v. State, 292 Ala. 120, 289 So. 2d 816 (1974); People v. Smith, 21 N.Y.2d 698, 234 N.E.2d 460, 287 N.Y.S.2d 425 (1971).

32. People v. Miller, 74 Ill. App. 3d 177, 392 N.E.2d 271 (1979).

33. People v. One Cadillac Automobile VIN #J8316714, 4 Ill. App. 3d 780, 281 N.E.2d 776 (1972).

The scope of the search may extend to objects closely identified with the person, such as a purse, but not to visitors' luggage. State v. Shope, 147 Ga. App. 119, 248 S.E.2d 188 (1978); Hayes v. State, 141 Ga. App. 706, 234 S.E.2d 360 (1977). *See also* Commonwealth v. Platou, 455 Pa. 258, 312 A.2d 29 (1973), *cert. denied*, 417 U.S. 976 (1974).

searched be named in a search warrant: (1) reasonable suspicion that the person is presently armed and dangerous, which would justify a frisk for weapons,[34] and (2) likelihood that important evidence will be destroyed in the absence of an immediate search.[35] These statutes, however, have extended these exigency exceptions to authorize searches of persons present during a warrant authorized search without the usual threshold of individualized reasonable suspicion or individualized probable cause.[36]

In refusing to approve such an extension of the exigency exceptions in the present case, the United States Supreme Court noted that a search of all patrons of a large retail or commercial establishment would be obviously violative of the fourth amendment.[37] The Court then examined the issue of whether or not the officers had probable cause to search Ybarra. The Court pointed out that the complaint on which the warrant was based did not allege that the patrons of the tavern were involved in the heroin traffic. Moreover the Court emphasized that Ybarra himself did not exhibit suspicious behavior such as words, movements, or gestures which might indicate an attempt to conceal contraband when the officers entered the tavern.[38]

The Court cited *Sibron v. New York*,[39] *Katz v. United States*,[40]

34. Terry v. Ohio, 392 U.S. 1 (1968). *See* text accompanying notes 17-21 *supra*.

35. Schmerber v. California, 384 U.S. 757 (1966); Carroll v. United States, 267 U.S. 132 (1925).

36. An alternative approach is taken by Massachusetts and New York statutes which allow warrants to explicitly authorize the search of premises and any person present "who may be found to have" the items sought in the warrant in his possession. MASS. GEN. LAWS ANN. ch. 276, § 2A (1972); N.Y. CRIM. PROC. LAW § 690.15(2) (1971). *See* Commonwealth v. Smith, 370 Mass. 335, 348 N.E.2d 101, *cert. denied*, 429 U.S. 944 (1976); People v. Easterbrook, 43 A.D.2d 719, 350 N.Y.S.2d 442 (1973), *aff'd*, 35 N.Y.2d 913, 324 N.E.2d 367, 364 N.Y.S.2d 899, *cert. denied*, 421 U.S. 965 (1974).

In states without such statutory authorization, the above language is generally held to be unconstitutionally broad. State v. Wise, 284 A.2d 292 (Del. Super. Ct. 1971); State v. Riggins, 138 N.J. Super. 497, 351 A.2d 406 (Super. Ct. Law Div. 1976); Garrett v. State, 270 P.2d 1101 (Okla. Crim. App. 1954); Crossland v. State, 266 P.2d 649 (Okla. Crim. App. 1954).

A North Carolina statute takes the unique approach of allowing police to detain persons present on premises until the warrant authorized search is completed, then, if the items described in the warrant have not been found, the police may search those persons, but no evidence of a different type than that described in the warrant may be seized or used as a basis for prosecution of any person so searched. N.C. GEN. STAT. § 15A-256 (1978). *See* State v. Long, 37 N.C. App. 622, 246 S.E.2d 846 (1978); State v. Watlington, 30 N.C. App. 101, 226 S.E.2d 186, *appeal dismissed*, 290 N.C. 666, 228 S.E.2d 457 (1976).

37. Ybarra v. Illinois, 444 U.S. at 89.

38. *Id.* at 90-91.

39. 392 U.S. 40, 62-63 (1968).

40. 389 U.S. 347, 351-52 (1967).

and *Rakas v. Illinois*[41] for the proposition that probable cause to search must be individualized because (1) the fourth and fourteenth amendments protect the privacy of persons, not places, and (2) mere propinquity to others independently suspected of a crime does not by itself create probable cause to search.[42] The Court concluded that despite the existence of the search warrant and the Illinois statute[43] the police did not have the requisite probable cause to search Ybarra.[44]

In contrast, Rehnquist's dissent denied that individualized probable cause was necessary to search Ybarra. While the fourth amendment requires probable cause for a search warrant to be issued, this requirement had been met with respect to the tavern and thus, according to Rehnquist, the justification for extending the scope of the search to the patrons should be judged by balancing the need to search against the severity of the intrusion.[45] Rehnquist argued that the fourth amendment required warrants to specify only the places to be searched, not the people, and that it was impractical to require that warrants name in advance every person whom the police might need to search.[46] Rehnquist also noted that if individualized probable cause to search Ybarra for heroin had existed, the warrant would have been irrelevant because Ybarra could have been arrested and fully searched incident to that arrest.[47]

The Court next examined the possible justification of the frisk of Ybarra within the suspicion rationale of *Terry v. Ohio*.[48] The Court stressed that the *Terry* exception is narrowly defined to require individualized reasonable suspicion that the suspect is presently armed and dangerous, and that *Terry* does not authorize a generalized search for weapons or a search for anything but weapons even at the site of a warrant authorized search.[49] The Court concluded that a weapons frisk of Ybarra was not justified because the police had no knowledge of any prior criminal history of Ybarra and no particular reason to believe that he was either armed or dan-

41. 439 U.S. 128, 138-43, 148-49 (1978).
42. Ybarra v. Illinois, 444 U.S. at 91.
43. *See* note 1 *supra*.
44. Ybarra v. Illinois, 444 U.S. at 91-92.
45. *Id.* at 105.
46. *Id.* at 102.
47. *Id.* at 105.
48. 392 U.S. 1 (1968); *see* text accompanying note 19 *supra*.
49. Ybarra v. Illinois, 444 U.S. at 93-94. *See* text accompanying notes 21, 24 *supra*.

gerous.[50]

In contrast, Rehnquist argued that the warrant coupled with the situation made the frisk a reasonable extension of *Terry* because (1) the warrant provided the element of detached deliberation not present in a warrantless street stop and frisk, (2) the peril of the police was greater in the tavern than in a routine street stop because of prolonged proximity and distraction while searching the tavern, and (3) it was reasonable for police to assume that because heroin sales were taking place at the tavern, patrons were involved in the illegal transactions.[51] Rehnquist claimed that narcotics dealers are usually armed, giving rise to a reasonable suspicion of danger from anyone slightly suspected of trafficking in drugs.[52] The essence of *Terry* was described by Rehnquist as a recognition of the need for flexible rules in situations like that present in *Ybarra*.[53]

The Court finally examined the State's argument that evidence searches of persons present at "compact" premises subject to a search warrant are constitutional when the police have a "reasonable belief" that such persons may be connected with those premises or may conceal or destroy contraband.[54] The Court cited *United States v. Di Re*[55] in holding that such an evidence search must be supported by individualized probable cause.[56]

The Court did not specifically hold the Illinois statute[57] to be unconstitutional *per se*, but held that it could not be constitutionally applied to the present case.[58] Thus, the most direct impact of

50. Ybarra v. Illinois, 444 U.S. at 92-93. Because the Court found that the frisk was unreasonable, it did not reach the issues of whether or not the frisk yielded probable cause to believe that Ybarra was carrying narcotics and whether or not this probable cause constitutionally supported the second search.

51. *Id.* at 106-07.

52. *Id.* at 106.

53. *Id.* at 105. The dissenting opinions of both Burger and Rehnquist criticized the exclusionary rule and advanced policy arguments for broad support of narcotics searches. *Id.* at 97-110.

54. *Id.* at 94. Chief Justice Burger states in his dissent: "[Police] are not required to assume that they will not be harmed by patrons of the kind of establishment shown here, something quite different from a ballroom at the Waldorf." *Id.* at 97. This comment may be construed to be either an indirect reference to the state's compact premises theory or a statement that the Chief Justice believes that a search is constitutionally more reasonable in a lower class setting.

55. 332 U.S. 581, 583-87 (1948).

56. The Court conceded that *Di Re* involved a warrantless search and was therefore not completely controlling, but found that the guiding principle of *Di Re* applied to the present case. Ybarra v. Illinois, 444 U.S. at 95.

57. *See* note 1 *supra*.

58. *See* Ybarra v. Illinois, 444 U.S. at 98 (Burger, C.J., dissenting).

Ybarra will be curtailment of the previously liberal construction of similar statutes.[59] In states with such statutes, individualized probable cause must now be shown to justify evidence searches of persons not named in search warrants who are present when the warrants are executed.[60] Likewise, individualized reasonable suspicion must now be shown to justify frisks for weapons in the same situations.

Police may avoid much of the impact of *Ybarra* by focusing on the elements of suspicion detailed in the majority opinion.[61] Police may become highly sensitized to gestures, movements, words, or prior criminal history which may be construed as suspicious. The language of *Ybarra* provides much room for flexibility in this regard because each of the elements which the Court noted was lacking in *Ybarra*, may if present in future cases, arguably provide grounds for distinguishing *Ybarra*. Moreover, *Ybarra* may influence magistrates to more closely examine complaints for search warrants to find probable cause for including more names on the warrant.[62]

It might be argued that police will be endangered by the prohibition of routine frisks of all occupants of compact premises subjected to a warrant authorized search. Police, however, have the option of allowing or asking all persons present but not named in the warrant to either leave or wait outside while the search is conducted. Prolonged proximity to such persons could thereby be avoided and police could safely direct their full attention to the search of the premises.[63] Moreover, if police have a reasonable suspicion that a particular person is presently armed and dangerous, *Ybarra* does not bar a frisk for weapons.[64]

It is also arguable that *Ybarra* will shield significant amounts of contraband from the reach of search warrants. If the police have probable cause to believe that a particular individual is concealing contraband, however, they also have probable cause to arrest and may conduct a full search incident to that arrest. Moreover, police

59. *See* notes 25-36 *supra* and accompanying text.

60. Whether *Ybarra* will prohibit the North Carolina approach, *see* note 36 *supra*, is unclear. A tentative conclusion is that the fact that a warrant authorized search did not uncover the evidence it sought would not of itself give rise to probable cause to believe that the individual(s) present are concealing contraband on their persons.

61. See text accompanying notes 38, 50 *supra*.

62. Whether *Ybarra* will prohibit the Massachusetts and New York approaches, *see* note 36 *supra*, of having warrants explicitly authorize the search of anyone present who *might* be armed or concealing contraband, is unclear. However, *Ybarra* does provide support for attacking such warrants as being unconstitutionally broad.

63. *See* text accompanying note 51 *supra*.

64. Terry v. Ohio, 392 U.S. 1 (1968). *See* text accompanying notes 17-21 *supra*.

usually arrive unexpectedly. Thus, the chance is remote that in anticipation of the search large amounts of contraband will be concealed on the persons of those present but not named in the warrant. In the final analysis, if police do not have probable cause to believe that a particular individual is concealing contraband, the risk that a small amount of contraband may evade the search does not reasonably justify the personal humiliation and invasion of privacy of anyone who happens to be in the wrong place at the wrong time.

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