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SEARCH AND SEIZURE OF AN AUTOMOBILE INCIDENT TO AN ARREST
FOR AN OFFENSE OTHER THAN A TRAFFIC VIOLATION

I. INTRODUCTION

The law concerning the search and seizure of automobiles has had a history which at times has varied from that of search and seizure of homes. The rules have become more liberal for the search of an automobile almost from the day of its invention, and only in the most recent decisions have these limits been contracted. A basic situation will suffice as the grounds for a discussion of the law concerning the search of automobiles. The facts of the hypothetical are:

The police have been following John James for the past two weeks in hopes that he will lead them to the source of a narcotics ring in one of the cities of the state of Jefferson. John has been convicted of the crime of unlawful possession of narcotics once, and of several minor offenses such as vagrancy on three or four occasions. He has just been released from prison after serving a sentence for the crime of battery which he perpetrated upon a police officer with a blackjack. He is considered dangerous when intoxicated, and the police have been warned that he may be carrying a weapon.

On the night of April 1, 1966, John drove through the city of Boone, Jefferson, a metropolis of about 100,000 people. He took a circuitous route, and it appeared as though he was trying to "shake" anyone who might be following him. After about an hour, he stopped his vehicle in a neighborhood which is known for its crime problems. He then walked two blocks and entered a house, stayed for about five minutes, and then left. When he was within one block of the automobile which he had been driving, the police arrested him, searched him, and then took him to the car and searched it, finding a .38 caliber pistol under the driver's side of the front seat. The weapon has not been registered. He is to be charged with the unlawful possession of an unregistered pistol, and before the case comes to trial, he objects to the admissibility of the weapon on the grounds that it was obtained by the police by means of an unlawful search and seizure.

II. THE EARLY CASES

A. *The Federal Jurisdictions*

One of the first cases to come before the United States Supreme Court concerning the search of an automobile was *Carroll v. United States*.¹ The problem presented was whether an officer who had probable cause to search an automobile could do so without obtaining a search warrant. Since obtaining a search warrant is highly impractical when the car is moving, the Court held that the important factor in determining the validity of the search was not the search warrant, but was the probable cause. The Court also discussed the problem of whether the right to search was based upon the right to arrest. It concluded that, "[t]he right to search and the validity of the seizure are not dependent on the right to

1. 267 U.S. 132 (1925).

arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."²

This case indicates that an automobile, while still subject to some restrictions, may be searched much more freely than a house. The holding is grounded on the difficulty of obtaining a search warrant in time to search a speeding vehicle. The justification is the moveability of automobiles.

The Court distinguished the search of automobiles based on probable cause from searches incident to arrest. The opinion did not rest on the right of an officer to search incident to a lawful arrest. Therefore, while *Carroll* liberalized the search of automobiles when the officer had a reasonable belief that their contents offended the law, it did not have the same effect on the doctrine of search incident to arrest when the officer did not have such a belief. It seems that the arrest is immaterial.

After the *Carroll* decision, the Court went through several stages of development in searches of premises. The Court adopted a strict position in *Trupiano v. United States*.³ It was held that, even though an officer was present when the defendant committed a felony, a search could not be justified without a search warrant. The test was the reasonableness of obtaining a search warrant; if there was time to obtain one, no search could be justified unless one had been obtained. This position was liberalized by *United States v. Rabinowitz*.⁴ In the majority opinion, it was stated that, "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."⁵ The stricter *Trupiano* test was never applied to automobiles because *Carroll* had liberalized the search of automobiles.

In applying the rationale of the *Carroll* decision to the facts set out in the introduction, it can be seen that there is no probable cause for the search of the automobile driven by John James. The officers have no belief that would lead to the issuance of a search warrant if presented to a magistrate. They have no information that there is any contraband in the vehicle, nor can they see anything about the automobile which would lead them to believe that there is contraband in it.⁶ There was certainly nothing to indicate that there was an unlicensed pistol in the car, although there are several possibilities that illegal goods are in it. Possibilities, however, are not enough to convince a magistrate that a search warrant should be issued. Facts must be presented to the magistrate, not possibilities.⁷ Therefore, it can be concluded on the basis of *Carroll* that the automobile could not be validly searched.

2. *Id.* at 158.

3. 334 U.S. 699 (1948).

4. 339 U.S. 56 (1950).

5. *Id.* at 66.

6. The reference is to an automobile that is very low on its springs as the one in *Carroll*, which reasonably leads the officer to believe that there is liquor in the vehicle *under the circumstances*.

7. *Giordenello v. United States*, 357 U.S. 480 (1958).

B. *Decisions in the State Courts*

The vast majority of the early state cases concerning searches of automobiles arose from violations of state and federal laws prohibiting illegal possession of intoxicating liquor. These decisions were influenced by two factors. The first was that until 1961, the states were not bound by the federal decisions in the area of search and seizure.⁸ This allowed them wide latitude in interpreting search and seizure provisions in state constitutions.⁹ The second, at first blush, appears to be contrary to the first. Though the states were free from control by the federal courts, they were influenced by decisions of the United States Supreme Court. Two decisions played important parts in the formation of state law on searches and seizures. One case was *Carroll v. United States*.¹⁰ The other was *Agnello v. United States*¹¹ where the court said, "[O]ne's house cannot lawfully be searched without a search warrant, *except as an incident to a lawful arrest.*"¹² *Agnello* concerned searches of houses; *Carroll*, automobiles. *Agnello* involved a search incident to arrest, and *Carroll* was limited to a situation where the arrest of the defendant was unimportant. Yet despite these differences, the state courts infused *Carroll* and *Agnello* into something which the Supreme Court of the United States never intended. They said that *Carroll* had liberalized the restrictions upon searches as they had related to automobiles, and *Agnello* allowed search incident to arrest; therefore, if there is a search of an automobile, which is also incident to an arrest, the limitations are almost entirely withdrawn. This statement may seem extremely broad, but an examination of the cases will bear it out.

In *Woods v. State*¹³ the defendant had been arrested for drunkenness and then jailed. Then his wagon, which was one mile from town at the time of the arrest, was searched. The search was held valid as incident to a lawful arrest because *Carroll* had liberalized the search of vehicles. Neither the place of the search, nor the lapse of time between the arrest and the search received any consideration. In *Reynolds v. State*¹⁴ the defendant was arrested after his hotel room was searched pursuant to a valid search warrant. He was taken to jail and his car, of which he denied all knowledge, was driven to the station. Then, another warrant was issued for the search of the automobile. The Texas Court of Criminal Appeals held that the second search warrant was unnecessary because the second search could be justified as incident to the arrest of the defendant in his hotel room. Again, *Carroll* was cited as liberalizing search of automobiles. But the real basis of the *Carroll* decision, i.e. that the search was justified on the basis of the probable cause and the necessity of stopping the automobile, and without regard

8. *Mapp v. Ohio*, 367 U.S. 643 (1961).

9. For an example of such provisions which are almost identical with the Fourth Amendment see MO. CONST. art. I, § 15.

10. *Supra*, note 1.

11. 269 U.S. 20 (1925).

12. *Id.* at 32. (Emphasis added.)

13. 37 Okla. Crim. 377, 258 Pac. 816 (1927).

14. 106 Tex. Crim. 391, 293 S.W. 178 (1927).

for the arrest, was not considered by the court.¹⁵ There are also cases which hold that if the defendant is arrested in an apartment house, his automobile, which is in the apartment house garage two floors below, may be searched as incident to the arrest.¹⁶ In *People v. Garrett*¹⁷ the defendant was arrested for being intoxicated, taken to the police station, searched, and then an officer who had found a key to a sedan in the defendant's possession searched the sedan. Liquor was found, and both at trial and on appeal, this search was held incident to a lawful arrest and therefore valid because of *Carroll* and *Agnello*.¹⁸

In almost all of the early state cases dealing with the search of an automobile, where there had been an arrest of the defendant at some time within several hours of the time of the search, the search was held valid as incident to the arrest. Also in these cases there is language to the effect that *Carroll* liberalized searches of automobiles; therefore, since search was allowed as incident to arrests, searches of automobiles incident to arrest would be allowed even though the arrest was not in the vicinity of the automobile. Yet neither *Agnello* nor *Carroll* indicate that they are to be combined in this manner. The doctrines presented by the cases are separate grounds for the searches. *Carroll* indicated that the right to arrest had nothing to do with the search of an automobile. All that the case indicated was that in some situations where a search warrant had been required before, no search warrant was now required. Search incident to arrest was already allowed without a warrant in order to protect the officer who arrested the defendant and to prevent the destruction of evidence.¹⁹ *Agnello* as restricted by *Rabinowitz*²⁰ only allowed search of those things within the reasonable control of the defendant incident to his arrest. In *Rabinowitz*, this was the desk at which the defendant was sitting at the time of his arrest and a filing cabinet.

When the early state court decisions are applied to the fact situation in the introduction to this article, the search would be valid as incident to the arrest of the defendant, John James. This case easily falls within the fact situation in *Woods v. State*²¹ and *People v. Garrett*.²²

In Missouri, two things must be noted before there can be an adequate discussion of the cases. First, Missouri was one of the first states to adopt the exclusionary rule.²³ Therefore, any evidence that the Missouri courts found to have been illegally seized was excluded from the trial much earlier than in most other states. Second, nowhere in the Missouri statutes on search and seizure,²⁴ is there a provision allowing the issuance of a search warrant for the seizure of things which may later be used in evidence. This means that any evidence

15. It is important that the reader compare this case with *Preston v. United States*, 376 U.S. 364 (1964), discussed *infra* at note 34, to see the full import of the misapplication of *Carroll*.

16. *State v. One Buick Automobile*, 120 Ore. 640, 253 Pac. 366 (1927).

17. 232 Mich. 366, 205 N.W. 95 (1925).

18. *Cf. Gambill v. State*, 45 Okla. Crim. 281, 283 Pac. 262 (1929).

19. *Supra*, note 5.

20. *Supra*, note 4.

21. *Supra*, note 13.

22. *Supra*, note 17.

23. *State v. Owens*, 302 Mo. 348, 259 S.W. 100 (1924).

24. § 542.380 RSMo 1959.

must be obtained at the time when there is probable cause for the search. The only time for seizure of evidence is at the time of the arrest, and this may be why the Missouri courts have been more liberal than the federal courts in allowing searches incident to arrest.

In *State v. Pinto*²⁵ a sheriff went onto the defendant's premises with what he thought was a valid search warrant. The sheriff thought that an illegal still was being operated on the premises by the defendant. He arrested defendant, and then searched the house and the porch, but found nothing. Then he searched the outbuildings, and in a building 100 yards from the house, he found mash. Part of the mash was introduced at trial over defendant's timely objection, and the court held that the sheriff had the right to search the premises where the arrest was made for the purpose of discovering any violation of the law. It was also held that the search was valid as incident to a lawful arrest, and that the evidence was admissible.²⁶ Although this case does not concern automobiles, it is indicative of the wide scope allowed by the early Missouri cases to a search incident to an arrest.

Many early cases present a common situation. An officer would obtain information that someone was going to haul liquor and the officer would lie in wait for the defendant or would stop him on the highway. In *State v. McNeece*²⁷ a sheriff had reason to believe that McNeece was transporting liquor and saw his automobile on the highway. The defendant readily admitted transporting liquor, and the sheriff searched the vehicle. The search was held valid on two grounds. First, the search was incident to a lawful arrest. Second, the sheriff had probable cause to believe that the defendant was using the car to transport liquor. The search can be justified on either theory because the defendant was arrested while he was in the automobile, and therefore had reasonable control of anything inside. For this reason, the search was valid on the basis of *Agnello* and *Rabinowitz* as incident to the arrest. Furthermore, the sheriff had probable cause to believe that the defendant was transporting liquor, and this brings the case within the scope of *Carroll*, which allows the search without regard for the arrest.²⁸

25. 312 Mo. 99, 279 S.W. 144 (1925).

26. If this case is compared with *Rabinowitz*, it is hard to see how the defendant could have been in reasonable control of an outbuilding 100 yards from the place where he was arrested. The search warrant was invalid, and the mash could not have been seized as evidence if the sheriff had been required to get another search warrant because no magistrate could have authorized seizure of the evidence. The mash could have been seized only as an incident to a lawful arrest. Today the outbuilding would be outside the scope of such a search.

27. 317 Mo. 304, 295 S.W. 737 (1927).

28. *Accord*, *State v. Bailey*, 320 Mo. 271, 8 S.W.2d 57 (1928); *State v. Davis*, 329 Mo. 743, 46 S.W.2d 565 (1932). In *Bailey* the defendant had just gotten out of his automobile when he was arrested. The sheriff had probable cause to believe that a felony had been committed, so the search was held valid as incident to a lawful arrest. The problem with the case was that the court said that since there was probable cause, the search was valid as an incident to the arrest. The fact of arrest should have made no difference because the search could have been made on the basis of *Carroll* alone.

In *State v. Askew*,²⁹ a sheriff had information that the defendant was coming into town to sell liquor. When he saw the defendant drive his automobile up to a house, he walked over to a spot from which he could look into the house. The officer saw the defendant pass a jug to another man. He called out to the defendant that he was under arrest, and the defendant fled. When the defendant had driven up to the house, there had been another man, Hull, in the vehicle with him. The sheriff arrested Hull while he was still in the car, and searched it, finding liquor. The defendant objected to the admission of the evidence. The Missouri Supreme Court held that since the defendant had abandoned the automobile to Hull, thereby relinquishing any standing to object to the search, the liquor was admissible against him. The search was justified as incident to the arrest of Hull. If Hull had not been in the automobile, the search would have been valid on the basis of *Carroll* because the action took place in a small town about thirty miles from the nearest magistrate, making it very impractical to get a search warrant. Since Hull was in the automobile, however, the court did not have to rely upon *Carroll*, and could base the search on the arrest.

In the above cases, the Missouri Courts were careful to maintain the distinction between a search based on *Carroll* and one incident to an arrest. The search was valid on either of the theories, but the courts were careful to list both. Only in the *Bailey*³⁰ case did the court attempt to combine the theories. In cases such as *McNeece*³¹ a clear distinction between search incident to arrest, and search based on probable cause other than arrest, can be maintained. *Askew*³² is more difficult to analyze along these lines, but even there the distinction is clear when compared to other early cases.

In *State v. Harlow*,³³ a more difficult situation arose. Harlow had agreed to sell liquor to a restaurant owner and was arrested inside the restaurant. Then two of his companions, who were still in his automobile outside the restaurant, were arrested and the automobile was searched. The search was not incident to the arrest of the defendant, but was incident to the arrest of the third persons who were in the defendant's automobile. In this case, the defendant had not abandoned the automobile to the third persons, and [apparently] still had standing to object to the search.³⁴ The search could have been justified on the basis of *Carroll*, but the Court merely said that the search was incident to a lawful arrest; and, therefore, the evidence was admissible against the defendant.

29. 331 Mo. 684, 56 S.W.2d 52 (1932).

30. *Supra*, note 28.

31. *Supra*, note 27.

32. *Supra*, note 29.

33. 327 Mo. 231, 37 S.W.2d 419 (1931). In this case, the sheriff not only knew that the sale had been agreed upon, but had asked the restaurant owner to order the liquor from the defendant.

34. *United States v. Sykes*, 305 F.2d 172 (6th Cir. 1962); *Preston v. United States*, 376 U.S. 364 (1964). These two citations are to the same case in which three men were arrested in an automobile, taken to the police station, and then the automobile was searched. As to *Preston*, the owner of the automobile, the search was invalid. As to his companions, the search was valid.

It is interesting to compare *Harlow*³⁵ with *State v. Padgett*.³⁶ In *Padgett*, a city marshall jumped onto the running board of defendant's automobile and turned off the ignition because the defendant was driving in a careless and reckless manner. When the defendant got out of the vehicle, a bottle half-full of whiskey fell out of his pocket. Both the defendant and his companion were drunk. The marshall searched the automobile and found two more full bottles. The officer had no knowledge that there was anything in the automobile, nor did he suspect that he might find anything in the nature of contraband until after the arrest. The Missouri Court upheld the search without a warrant because of *Carroll*. In *Harlow*, the sheriff knew that if the defendant came to the restaurant, there would likely be liquor in the automobile. There was probable cause for the search in *Harlow* which was independent of the arrest, while the right to search in *Padgett* was without any basis other than that found during the arrest. What was an arrest for a simple traffic violation became an arrest for a more serious crime, and a search incident to such an arrest was valid. The theories of the cases are reversed. The search in *Harlow* should have been based upon *Carroll*, and that in *Padgett* should have followed *Agnello*.

As demonstrated by the preceding cases, the courts proceeded under one theory when they might have interpreted a case under another with much less difficulty. The basic problem is much deeper than a mere choice of which theory to follow. Professor Scurlock³⁷ best described it:

Since allowing movable vehicles to be searched without a warrant is only an exception to the general rule requiring a warrant, one would expect that an officer would be obliged to get a warrant (where the statute authorizes it) to search a vehicle wherever there is no danger that it will be moved before the warrant can be obtained. However, there is no suggestion in the Missouri cases that this is so. The Missouri Supreme Court seems to treat search of vehicles as if it were a situation somewhat outside the Constitution; the only qualification to the validity of the search apparently is that probable cause must exist before the search is commenced.

In *McNeece, Askew, Davis, and Harlow* there was some reasonable grounds for belief that the defendants would be transporting liquor, and this was probably enough to convince a magistrate that a search warrant should be issued. It would be difficult for a court to reverse a case merely because the arresting officer had made a mistake of law, especially in a situation where the evidence obtained by the search was so persuasive.

III. LATER DECISIONS AND THE STANDARDS OF UNIFORMITY

In 1961, the Supreme Court decided *Mapp v. Ohio*,³⁸ which imposed the exclusionary rule on the states. This meant that the states had to follow the mini-

35. *Supra*, note 33.

36. 316 Mo. 179, 289 S.W. 954 (1926).

37. Scurlock, *Searches and Seizures in Missouri*, 20 U. Kan. City L. Rev. 227, 274 (1952).

38. 367 U.S. 643 (1961).

mal constitutional standards laid down by the Supreme Court. The states were no longer free to determine the requirements for a valid search and seizure. The states were required to follow the guidelines laid down by the Supreme Court.

A. *The Federal Standard*

*Henry v. United States*³⁹ demonstrates the distinction between the search of an automobile incident to an arrest and a search under the doctrine of *Carroll*. The defendant was illegally arrested; therefore no search could be justified as incident to the arrest. Furthermore, there was no probable cause that would bring the case within *Carroll*. The court did not allow the two interpretations to be combined saying:⁴⁰

The fact that the suspects were in an automobile is not enough. *Carroll v. United States*, 267 U.S. 132 (1925) liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on the grounds of the practicability. It did not dispense with the need for probable cause.

The difference between the two doctrines is that under *Carroll*, the search could have been made before the defendant was arrested; while if the search had been incident to the arrest, it would be legal only after a valid arrest. The arrest in *Henry* could have been justified only if there had been a valid search based upon the reasoning of *Carroll*.

Search incident to arrest is based solely upon the right to arrest. The police have the right to search one arrested for weapons, fruits of the crime for which the accused has been arrested, and to prevent the destruction of the evidence.⁴¹ Such a search is allowed because the police have the right to protect themselves and to remove any means for escape. However, it cannot be said that *Carroll* increased the ability of the police to protect themselves from the danger presented by an arrested felon. The search of the automobile in the hypothetical will not protect the police, and there is no reason to believe that there is any evidence which can be destroyed in the automobile. Yet the early state cases allowed search of an automobile one mile from the place of arrest, as incident to the arrest.⁴²

If the automobile of John James can be searched incident to his arrest, the automobile must be within the immediate vicinity of the arrest. It is difficult to determine the permissible scope of the search. The Supreme Court of the United States has laid down a broad general rule, allowing the lower federal courts and the state courts to determine the exact limits of that rule. The general rule is: "A search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest."⁴³

39. 361 U.S. 98 (1959).

40. *Id.* at 104.

41. *Preston v. United States*, *supra*, note 34.

42. *Woods v. State*, *supra*, note 21.

43. *Preston v. United States*, *supra*, note 34; *Stoner v. California*, 376 U.S. 483 (1964); *James v. Louisiana*, 382 U.S. 36 (1965).

The application of the doctrine of search incident to arrest presents a paradox. If a person is arrested on the first floor of a rooming house, the police may not go to the second floor and search his room if the only basis for the search is the arrest.⁴⁴ Yet if he is arrested in his house, the police may go outside and search his automobile.⁴⁵ The distance to the automobile may be greater than the distance to the defendant's room. This means that the radius of the "immediate vicinity" of the arrest is expanded merely because an automobile is involved. The liberalization of the search of automobiles is based upon *Carroll*, and the rationale of *Carroll* does not depend upon an arrest. Without a reasonable belief that the contents of the automobile offend the law, there is no liberalization. Absent reasonable belief, why should the "immediate vicinity" be expanded? This question has not been answered by any court.

It should be clear that if a man is arrested in his automobile, and the automobile is searched on the spot, the search will be valid as incident to the arrest.⁴⁶ It is only when the search is carried to another spot, or is delayed for a substantial period of time that serious questions arise. An excellent example of the problem is the situation which gave rise to the Supreme Court's decision in the *Preston*⁴⁷ case. There the defendant and two others, while sitting in an automobile, were questioned about the reason for their presence. They gave unsatisfactory answers and were arrested. When they could produce only twenty-five cents, they were arrested for vagrancy, taken to the police station, and booked. At the same time they were taken to the station, the police had their automobile towed to the police garage, where it was searched. The trio was later tried and convicted for conspiracy to rob a bank. At the trial the weapons and other material discovered during the search were introduced and were admitted into evidence over defendants' objection. The Court of Appeals affirmed, holding that the search was incident to the arrest of the defendants.⁴⁸ The Supreme Court reversed as to the defendant *Preston's* conviction, saying that the search was too far removed from the arrest both in time and in place to be incident to the arrest.⁴⁹

There have been earlier Courts of Appeals decisions discussing the requirements of time and place. From some of these cases one can determine how the lower federal courts have been interpreting these requirements. If the defendant was arrested for a crime, which reasonably requires the use of an automobile, (interstate transportation of illegal liquor) the automobile may be searched if it is within 100 to 200 yards of the place of arrest. This is especially true if the

44. *United States v. Marrese*, 336 F.2d 501 (3d Cir. 1964).

45. *Hollins v. United States*, 338 F.2d 227 (9th Cir. 1964); But *cf.* *Simpson v. United States*, 346 F.2d 291 (10th Cir. 1965).

46. *Adams v. United States*, 336 F.2d 752 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 977 (1965).

47. *Preston v. United States*, *supra*, note 34.

48. *United States v. Sykes*, *supra*, note 34.

49. The conviction of the other two defendants was affirmed because they did not have standing to object to the search. *Preston* alone had standing to object because he had "possession" of the vehicle, and the other defendants were merely passengers.

arrest takes place in an isolated area.⁵⁰ However, it is necessary that the search take place before the defendant has been taken to the police station.⁵¹

Soon after *Preston* was decided, the Court of Appeals for the Sixth Circuit announced the decision in *Arwine v. Bannan*.⁵² *Arwine* was based upon the arresting officers' reasonable belief that the defendant committed a felony. The defendant and a companion were observed leaving their vehicle at about 9:55 p.m. At about 10:00 p.m. there was an explosion in the vicinity of a store that the officers suspected the defendant was going to rob. At about 10:25 p.m. the defendant approached the automobile and was arrested. From 10:25 p.m. until 1:45 a.m. the defendant was left in the automobile as a decoy for his partner. At 1:45 a.m. he was taken to the police station where the automobile was searched in his presence. The burglar tools found in the automobile were entered into evidence at the defendant's trial. This admission was upheld by the court. The court used two facts to distinguish this case from *Preston*. First, the arrest was for a suspected felony. Second, the search was made in the defendant's presence. In *Preston* the search took place at the police garage while the defendant was being booked.

The question before the court was whether this search was substantially contemporaneous with, and in the immediate vicinity of the arrest. The court held that the arrest was made in the vicinity of the automobile; therefore, any search in the vicinity of the automobile, even if it had been taken to the police station, was incident to the arrest because it was in the immediate vicinity of the automobile. The court finessed the issue of contemporaneousness by saying that the Supreme Court did not mean what it said in *Preston*.

If a search three hours and ten minutes after the arrest is contemporaneous with the arrest, then why was the search in *Preston* not upheld? This court says that the reason is found in the fact that the defendant was present when this search was made, and if it had not been made in his presence, it would have been obviously unfair to him. However, the reason for allowing search incident to arrest without a warrant is not to be fair to the defendant, but is to protect the arresting officers.

The court also said that *Carroll* had liberalized the search of automobiles, so that the requirements for search of houses did not have to be met. Although this is true, *Carroll* did not depend upon the right of arrest. This court has attempted to do the same thing many other courts have tried, i.e. combine the two reasons for the search of automobiles into one broad, liberal theory by saying the magic words "*Carroll*" and "incident to arrest."

The *Arwine* case neglects *United States v. Stoffey*.⁵³ There the defendant entered a tavern at 11:50 a.m. after parking his vehicle on the street near the tavern. He was searched upon entry, and was required to stay in the tavern until 2:50 p.m. when the officers obtained the defendant's keys and went outside and searched the vehicle. The Court of Appeals for the Seventh Circuit held that

50. *United States v. Walker*, 307 F.2d 250 (4th Cir. 1962); *Rhodes v. United States*, 224 F.2d 348 (5th Cir. 1955).

51. *Crawford v. Bannan*, 336 F.2d 505 (6th Cir. 1964).

52. 346 F.2d 458 (6th Cir. 1965).

53. 279 F.2d 924 (7th Cir. 1960).

there was more than adequate time to obtain a search warrant; that there was no danger of the car being driven away; and that the automobile wasn't in movement or occupied by the defendant at the time of his arrest, almost three and one-half hours earlier. As well reasoned as the *Arwine* case appears, it is wrong.

If *Arwine* is applied to the fact situation concerning John James, it should be obvious that the automobile could be searched as incident to the arrest of James. It still could not be searched under *Carroll* even though *Arwine* would lead one to believe that it could. *Carroll* has no application where the search is justified solely as an incident to the arrest.

B. Decisions of the State Courts

State courts, as well as federal courts, have experienced great difficulty in determining a consistent standard to apply in the area of search and seizure incident to arrest. The states generally agree that if one is arrested in an automobile in the immediate vicinity of his home, there cannot be a search of the home.⁵⁴ Other state cases have held that if the defendant was arrested inside a building, whether his home or another building, a search of his automobile outside that building, but reasonably close by, was valid as incidental to the arrest.⁵⁵ In *Liakas v. State*,⁵⁶ the defendant was caught by the police trying to run from the scene of a theft; he tried to swallow an automobile claim check, which the officers wrested from him. The police went to the parking lot where they found the car with several unfinished suits in it. The Tennessee Supreme Court held that the search was valid as incident to the arrest because the officers might reasonably conclude from the defendant's actions that the automobile had been stolen.⁵⁷ The court did not discuss whether the scope of the search extended to the parking lot in which the automobile was found. A better basis, if there was one, for finding that the search was valid, would be *Carroll*. The same conclusion could have been reached on a much sounder basis.

In Missouri, the law concerning the search of automobiles has undergone some change since the *Mapp* decision. In 1958, the Supreme Court of Missouri decided *State v. Edwards*⁵⁸ in which the defendant was arrested while riding in an automobile. Both he and the automobile were taken to the police station and the car was searched ten minutes after he was taken into the station. The search was

54. *State v. King*, 84 N.J. Super. 297, 201 A.2d 758 (1964).

55. *Atkins v. Harris*, 202 Tenn. 489, 304 S.W.2d 650 (1957).

56. 199 Tenn. 298, 286 S.W.2d 856 (1956), cert. denied, 352 U.S. 845 (1957).

57. When the officers found the automobile, the suits were clearly visible through the window of the automobile. The question raised is whether there was a search since the officers could see the suits without entering the automobile. Several cases hold that if a police officer sees articles through the window of an automobile which are contraband, or which he reasonably believes have been stolen, there is no search. *People v. Elmore*, 28 Ill.2d 263, 192 N.E.2d 219 (1963); *State v. Camper*, 353 S.W.2d 676 (Mo. 1962); *State v. Hawkins*, 240 S.W.2d 688 (Mo. 1951). Often a person voluntarily or involuntarily opens the trunk of an automobile for officers, and the case is decided on the basis of consent. *Mann v. City of Heber Springs*, 395 S.W.2d 557 (Ark. 1965).

58. 317 S.W.2d 441 (Mo. 1958).

held valid as incident to the arrest. In 1964, *State v. Edmondson* was decided.⁵⁹ The police in Albuquerque, New Mexico, arrested the defendant in a motel room after they had received a telegram from the sheriff of Greene County, Missouri, informing them that the defendant had robbed two employees of the J. C. Penny store in Springfield. The officers took the defendant and his automobile to the police station and searched the automobile, finding slips from the Penny store in the car. The Missouri Supreme Court held that since there was no emergency, and no need to prevent destruction of evidence or to protect the police officers, the search was not incident to the arrest. This decision followed the decision in *Preston*. The decision apparently overruled *Edwards*.⁶⁰

The same is true of the fact situation set out in the introduction. There is no danger that any evidence would be destroyed, nor is there any need to search the automobile in order to protect the officers, and there is certainly no emergency. Under the above Missouri decisions, there could be no search incident to the arrest. But, there is language in another decision to the effect that an arrest alone will cure any defect in the illegality of any search.⁶¹ The language is wrong.

In *State v. Watson*⁶² the defendant was arrested inside the home of one Foster. The officers went outside the house to the automobile, which the defendant had driven up to the house. They asked the defendant for the keys; he denied any knowledge of the automobile and said that he had walked to the house. Through the windows of the automobile, the officers could see tools; the officers had a warrant for the arrest of the defendant for burglary, and they appeared to be burglar tools. The car was searched and a gun was found under the front seat and more tools were found in the trunk. Defendant was convicted of the unlawful possession of burglar tools.

The search was upheld on two theories. First, the search was incident to a lawful arrest. This is true even though there was neither risk of harm to the officers, nor any danger of escape. Once the officers saw the tools in the back seat, they may have been able to search on the basis of *Carroll*; but the arrest was in the house, and not centered near the automobile as was the arrest in *Arwine*. In that case, the arrest was in the immediate vicinity of the automobile; in this case it was not.

Second, the defendant had abandoned any right to object to the search by reason of his disclaimer. Yet, the officers knew that he had been in possession of the automobile. The court said that once one denies any knowledge or right to possession of property, it shall be deemed that he has abandoned it for the pur-

59. 379 S.W.2d 486 (Mo. 1964).

60. Although *Edmondson* apparently overruled *Edwards*, the Missouri Supreme Court has since cited *Edwards* with Approval in *State v. Watson*, 386 S.W.2d 24 (Mo. 1964).

61. *State v. Wilkerson*, 349 Mo. 205, 212, 159 S.W.2d 794, 795 (1942): "Nor would the admission of illegally seized evidence constitute reversible error if the defendant himself admitted and testified to the evidence complained of *or if there had been a lawful arrest.*" (Emphasis added.) Yet once evidence is illegally seized, it cannot be cured merely because there was an arrest.

62. *Supra*, note 60.

poses of determining the validity of the search of that property. However, one does not lose his property interest by this means, and a property interest is all that is required to object to a search. Abandonment is an entirely different question in the law. The search might be held valid on the basis of *Carroll*, but decisions like this one only add to the confusion of officers, since they do not lead to any established rules which they can follow.

IV. CONCLUSION

There are two theories upon which the search of an automobile may be based. The first in point of time is the doctrine of *Carroll*. Where reasonable grounds exist, *Carroll* eliminates the requirements for a search warrant. It did not liberalize search merely because a vehicle was involved. This is an expansion that was developed to justify a search like that in *Gambill*.⁶³ Some courts merely added *Carroll* to *Agnello* to find an easy method of justifying the search of any automobile. *Carroll*, however, is limited to situations where the right to arrest is unimportant.

The second is that of search incident to arrest. When officers arrest someone, they have the right to protect themselves and to prevent the person arrested from escaping or destroying evidence. Limitations have been placed upon this doctrine, viz. substantial contemporaneousness and immediacy of vicinity. No such requirements were placed upon a search under *Carroll*. But, through a combination of the two, courts have allowed general exploratory searches as the one in the example. The example was set up so that the officers had no belief that there was anything offensive to the law in the automobile; and, further, the search in the example was too far removed to be in the immediate vicinity of the arrest. It can be justified only through the combination of the two doctrines. This is the evil that this comment demonstrates. The only basis for the search is exploration, the so-called "general warrant" for which American courts express such abhorrence, and yet allow through the interpretations of searches in the manner described in this comment.

State courts are bound by the federal standard of reasonableness. Nowhere in the decisions of the Supreme Court of the United States is there justification for the double application of the doctrines of *Carroll* and *Agnello*. By such an application, the courts are allowing the very wrong the Fourth Amendment was intended to prevent, the general exploratory search.

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63. *Supra*, note 18.