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SEARCH AND SEIZURE—THE DESTRUCTION OR REMOVAL OF EVIDENCE EXCEPTION TO THE WARRANT REQUIREMENT ADOPTED IN MISSOURI

*State v. Wiley*¹

An anonymous informant told police that narcotics were stored in the refrigerator of an apartment in Missouri and would be removed to Illinois within a short time. Police officers immediately “staked out” the apartment. An officer reported known drug users in the neighborhood as well as a car with an Illinois license that drove into the apartment building parking lot and quickly left upon noticing the officer. The police and prosecutor attempted to contact two judges to obtain a search warrant, but were unsuccessful.² Police subsequently entered the apartment without a warrant and arrested all of the occupants including defendant Wiley. Immediately thereafter an officer went “straight to the back door [to admit other officers] and then straight to the ice box.”³ Drugs were found in the refrigerator and seized. No other search of the apartment was made.

At trial defendant’s motion to suppress the drugs was overruled and he was convicted.⁴ The Missouri Court of Appeals, St. Louis District, affirmed.⁵ The case was transferred to the Missouri Supreme Court, which affirmed the conviction. The court held the warrantless search, although not sustainable as incident to arrest, was valid on two grounds: (1) a search warrant was not required because the possibility of destruction or removal of evidence presented “exigent circumstances;”⁶ and (2) a warrantless search could be conducted immediately after arrest to confirm anonymous information and determine whether the suspects should be detained or released.⁷

The fourth amendment generally requires that police obtain a warrant before searching a dwelling.⁸ The United States Supreme Court has, however, recognized “a few specifically established and well-delineated exceptions to the warrant requirement.”⁹ The exceptions are justified by the

1. 522 S.W.2d 281 (Mo. En Banc 1975).

2. The court did not indicate why the attempts were unsuccessful.

3. 522 S.W.2d at 285.

4. *Id.* at 284.

5. *Id.*

6. *Id.* at 290.

7. *Id.* at 291.

8. *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Agnello v. United States*, 269 U.S. 20, 32 (1925); *Carroll v. United States*, 267 U.S. 132, 151 (1925). The rationale of the warrant requirement is to balance the competing interests of police officers engaged in solving crimes against the expected right of privacy in the home. *McDonald v. United States*, 335 U.S. 451, 455-56 (1948); *accord*, *Chimel v. California*, 395 U.S. 752, 761 (1969). Invalidly seized evidence is excluded even though there was probable cause to search. *Agnello v. United States*, *supra* at 33; *accord*, *Coolidge v. New Hampshire*, *supra* at 449; *Chimel v. California*, *supra* at 762.

9. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971); *Chimel v. Cali-*

presence of unusual or exigent circumstances.¹⁰ Common exceptions include "search incident to arrest,"¹¹ "stop and frisk,"¹² and "hot pursuit of a fleeing felon."¹³ A relatively unknown exception has recently been the subject of voluminous litigation: the destruction or removal of evidence exception.

The destruction/removal exception provides that police may search and seize without a warrant in order to keep tangible evidence from being destroyed or removed from the jurisdiction. Only recently has this exception been needed. Before the 1969 decision in *Chimel v. California*,¹⁴ the search incident to arrest exception was broad enough to include warrantless searches of entire dwellings and thus include most situations where the destruction/removal exception is now used.¹⁵ *Chimel*, however, narrowed the scope of search incident to arrest to the area within the suspect's immediate control.¹⁶ The destruction/removal exception allows the broader pre-*Chimel* search under the proper circumstances.¹⁷

The Supreme Court has never ruled explicitly on the destruction/removal exception.¹⁸ Proponents of the exception point to dicta,¹⁹ bases for other exceptions,²⁰ and *Schmerber v. California*²¹ to show that the Court has, in effect, recognized the exception. In *Schmerber* the police arrested defendant for driving while intoxicated and took a blood sample over objection. The Court held that the warrantless search was valid because the delay necessary to get a search warrant would have "threatened the 'destruction of evidence'"²²—i.e., alcohol in blood would diminish with time.

fornia, 395 U.S. 752, 763 (1969); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

10. For instance, the "search incident to arrest" exception has been created to allow the police to seize weapons that could be used to effect escape or seize evidence that could be destroyed. *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969). The basis for the "moving vehicle" exception is the possibility of removal of the suspect car from the jurisdiction before a warrant can be issued. *Carroll v. United States*, 267 U.S. 132 (1925).

11. *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

12. *Terry v. Ohio*, 392 U.S. 1 (1968).

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

14. 395 U.S. 752 (1969).

15. See, e.g., *United States v. Rabinowitz*, 339 U.S. 56 (1950) (business office); *Harris v. United States*, 331 U.S. 145 (1947) (four-room apartment).

16. 395 U.S. at 768.

17. See, e.g., *United States v. Blake*, 484 F.2d 50 (8th Cir. 1973), cert. denied, 417 U.S. 949 (1974).

18. *Id.* at 54; *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir.), cert. denied, 414 U.S. 833 (1973); Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465, 1468 (1971).

19. *Preston v. United States*, 376 U.S. 364, 368 (1964); *Chapman v. United States*, 365 U.S. 610, 615 (1961); *United States v. Jeffers*, 342 U.S. 48, 52 (1951); *McDonald v. United States*, 335 U.S. 451, 455 (1948); *Johnson v. United States*, 333 U.S. 10, 15 (1948).

20. See authorities cited note 9 *supra*.

21. 384 U.S. 757 (1966).

22. *Id.* at 770.

Opponents point to cases where the Court has had the opportunity to use the destruction/removal exception, but has instead chosen to invalidate the search.²³ In *Vale v. Louisiana*²⁴ defendant sold narcotics to the driver of a car in front of defendant's apartment. The police arrested him as he tried to get back inside and subsequently entered the apartment and conducted a full warrantless search. Had the search not been conducted then, the defendant's mother and brother, who were in the apartment, might have destroyed the evidence.²⁵ The Court noted that the Louisiana Supreme Court approved the search on the grounds that "it involved narcotics, which are easily removed, hidden, or destroyed."²⁶ Nonetheless, the Supreme Court held the search invalid because it did not come within any recognized exception to the warrant requirement.²⁷ *Chimel v. California*²⁸ contained similar reasoning. In *Chimel* the defendant was arrested for burglary of a coin shop. A police officer completely searched defendant's house and seized coins later used to convict defendant. The Court held that the search was too broad to be allowed under the search incident to arrest exception. The dissent argued that the search should have been upheld because the defendant's wife, who was present at the arrest, could have removed the evidence.²⁹ The majority opinion, however, did not comment on this argument.³⁰

Federal appellate courts have generally accepted the destruction/removal exception,³¹ and have examined a number of factors to be con-

23. THE MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 260.5, Comment (Proposed Official Draft No. 5, 1975), rejects the destruction/removal exception, stating: "[I]f *Agnello v. United States*, 269 U.S. 20 (1925), is still good law as the *Vale* case, 399 U.S. 30 (1970), indicates, such a provision [destruction/removal exception] would be unconstitutional." In *Agnello* the defendant's dwelling was searched without a warrant and the narcotics found were used at his trial. The government argued that the "moving vehicle" exception should be extended to premises. The Court stated:

While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.

269 U.S. at 32.

24. 399 U.S. 30 (1970).

25. *Id.* at 33.

26. *Id.* at 34.

27. *Id.* at 33-35.

28. 395 U.S. 752 (1969).

29. *Id.* at 775.

30. The majority might have thought that the evidence was unmovable because of the probability of police surveillance of defendant's dwelling while obtaining a warrant. If the wife tried to leave with the coins, she could have been searched without a warrant under the search incident to arrest or the moving vehicle exceptions. See text accompanying notes 41-42 *infra*.

31. See, e.g., *United States v. Blake*, 484 F.2d 50 (8th Cir. 1973), *cert. denied*, 417 U.S. 949 (1974); *United States v. Davis*, 461 F.2d 1026 (3d Cir. 1972); *United States v. Wright*, 449 F.2d 1355 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 947 (1972); *Gaines v. Craven*, 448 F.2d 1236 (9th Cir. 1971); *United States v. Pino*, 431 F.2d 1043 (2d Cir. 1970), *cert. denied*, 402 U.S. 989 (1971); *Piva v. United States*, 387 F.2d 609 (1st Cir. 1967).

sidered in determining whether the exception should apply:³² (1) whether there is time to obtain a warrant before removal or destruction of the evidence;³³ (2) whether the belief that the evidence is about to be removed or destroyed is reasonable;³⁴ (3) whether police would be endangered by impounding defendants or the place of search until a warrant is obtained;³⁵ (4) whether the suspects are likely to know that they or the evidence are under surveillance;³⁶ (5) whether the suspects will discover that they are under surveillance;³⁷ (6) whether police contribute to the exigency of the situation;³⁸ and (7) whether the particular type of evidence is easily destroyed.³⁹

In *Wiley* the first and principal ground relied on by the majority was "exigent circumstances." The exigent circumstance was the possible destruction or removal of narcotics from Missouri before police could obtain a warrant. Thus, the Missouri Supreme Court, in effect, adopted the destruction/removal exception to the warrant requirement. The dissent did not dispute the validity of the destruction/removal exception, but contended that the majority failed to establish an immediate danger of removal or destruction under the facts of this case.⁴⁰

32. Word formulas such as "threatened with imminent removal or destruction" are frequently used. See, e.g., *United States v. Blake*, 484 F.2d 50, 54 (8th Cir. 1973), cert. denied, 417 U.S. 949 (1974). This leaves the standards for determining whether evidence is in danger of removal or destruction—i.e., when the destruction/removal exception can be used, hinging on subjective definitions of "threatened" and "imminent." The key facts that are discussed in the cases present a much more precise way of determining when the exception is applicable. See *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir.), cert. denied, 414 U.S. 833 (1973).

33. *United States v. Davis*, 461 F.2d 1026, 1030-31 (3d Cir. 1972); *United States v. Pino*, 431 F.2d 1043, 1045 (2d Cir. 1970), cert. denied, 402 U.S. 989 (1971).

34. *United States v. Rubin*, 474 F.2d 262, 269 (3d Cir.), cert. denied, 414 U.S. 833 (1973); *United States v. Davis*, 461 F.2d 1026, 1031 (3d Cir. 1972); *Gaines v. Craven*, 448 F.2d 1236, 1237 (9th Cir. 1971); *Theobald v. United States*, 371 F.2d 769, 771 (9th Cir. 1967).

35. *United States v. Rosselli*, 506 F.2d 627, 631 (7th Cir. 1974) (dictum); *United States v. Pino*, 431 F.2d 1043, 1045 (2d Cir. 1970), cert. denied, 402 U.S. 989 (1971).

36. *United States v. Rubin*, 474 F.2d 262, 269 (3d Cir.), cert. denied, 414 U.S. 833 (1973); *United States v. Doyle*, 456 F.2d 1246, 1247 (5th Cir. 1972).

37. *United States v. Curran*, 498 F.2d 30, 35 (9th Cir. 1974); *United States v. Bustamante-Gamez*, 488 F.2d 4, 8-9 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974).

38. *United States v. Rosselli*, 506 F.2d 627, 629-31 (7th Cir. 1974); *United States v. Curran*, 498 F.2d 30, 34 (9th Cir. 1974) (dictum).

39. *United States v. Cushnie*, 488 F.2d 81, 82 (5th Cir. 1973), cert. denied, 419 U.S. 968 (1974) (dictum); *United States v. Davis*, 461 F.2d 1026, 1031-32 (3d Cir. 1972); *United States v. Manning*, 448 F.2d 992, 998-99 (2d Cir.), cert. denied, 404 U.S. 995 (1971).

40. The *Wiley* majority cited *United States v. Rubin*, 474 F.2d 262 (3d Cir.), cert. denied, 414 U.S. 833 (1973), and *United States v. Blake*, 484 F.2d 50 (8th Cir. 1973), cert. denied, 417 U.S. 949 (1974), to support the "exigent circumstances" argument. 522 S.W.2d at 290, 294. In *Rubin* defendant picked up narcotics under surveillance by the police and took them to a dwelling where others were seen coming and going. Defendant left and police stopped him when they feared that he had detected their surveillance. He yelled in a neighborhood where he was

The search in *Wiley* is excused from the warrant requirement by the destruction/removal exception only if narcotics found by the police were in danger of removal or destruction. The Missouri Supreme Court never stated the facts that indicated that the narcotics were about to be removed or destroyed, but nevertheless concluded that the destruction/removal exception was applicable. Only inferences from two facts in *Wiley*, however, could have suggested destruction or removal: (1) the drugs might be removed to Illinois according to the informant's tip; or (2) the drugs might be destroyed because the driver of the car that pulled into and quickly left the apartment building parking lot might call and warn the occupants of the apartment. As to the possibility of the drugs being removed to Illinois, there was time to get a warrant before removal.⁴¹ The police could have waited to obtain a warrant because the occupants of the apartment were under surveillance. If they tried to go to Illinois, the drugs could be seized under the "moving vehicle" or "search incident to arrest" exceptions. As to the possibility of the evidence being destroyed, there was not time to obtain a warrant.⁴² Furthermore, the narcotics could easily have been destroyed.⁴³ However, the belief that the narcotics were about to be destroyed was not reasonable⁴⁴ under the circumstances, because the only fact supporting that belief is that a car left a parking lot. In addition, the police contributed to the exigency of the situation⁴⁵ by conducting surveillance in a marked police car. The police-created exigency and the unreasonable belief that evidence was about to be destroyed far outweigh

well known, "Call my brother." His conviction was upheld. The yell could reasonably have been interpreted as a signal to destroy evidence directed to the other people that were with the narcotics. In addition, an attempt had been made to get a warrant. In *Blake* police went to defendant's dwelling with an arrest warrant, but the back door "stake-out" officer saw someone (not defendant) start to throw a white change purse. The court found that the police had probable cause to believe that the change purse contained narcotics. Because the police otherwise would have had to leave the stranger with the purse that he had already tried to destroy, the court held the police were justified in a warrantless search that found the purse containing narcotics down a clothes chute.

The dissent in *Wiley* argued that the facts of *Wiley* resembled those of *Vale* and that the holding in *Vale* should be controlling. 522 S.W.2d at 296. The dissent pointed out that in *Blake* the "federal agents virtually saw the defendant throw the narcotics down the clothes chute." Furthermore, the dissent pointed out that because the stranger in *Blake* was not under arrest, the delay in getting a warrant would have been fatal. *Id.* at 297. The dissent emphasized that in *Rubin* "[t]he agents know that at least one other person, who was not in custody had been left at the defendant's dwelling. . . ." *Id.* The dissent summarized by saying:

The *Blake* and *Rubin* cases thus demonstrate emergency situations where there is a very real threat of destruction or removal of evidence by persons not in custody with access to the contraband. In this case there was no such threat.

Id. at 296.

41. See note 30 and accompanying text *supra*.

42. See note 30 and accompanying text *supra*.

43. See note 36 and accompanying text *supra*.

44. See note 31 and accompanying text *supra*.

45. See note 35 and accompanying text *supra*.