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Scope of Search Incident to Arrest: Missouri's Application of the Exception

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should focus on the evidence presented during trial in light of the requirement that such evidence be clear and convincing.

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SCOPE OF SEARCH INCIDENT TO ARREST: MISSOURI'S APPLICATION OF THE EXCEPTION

State v. Brasel[1]

The defendant, Ronald E. Brasel, registered at a St. Louis motel under an assumed name. Mr. Armstrong, the motel manager, received information from motel employees that there were drugs in defendant's room. After viewing the room, he telephoned the police to report having observed a large quantity of bottled pills and capsules (many with federal warrants) in defendant's room. Thirty minutes later the police arrived and were shown one registration card bearing "Ronald Bradley" and a license number. Officers then viewed defendant's room firsthand. A later check on the license number revealed the car was registered to "Ronald Brasel."

The officiers waited in an adjoining room and knocked on Brasel's

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judge sat as factfinder. The statement would apply as well to legal claims where it is the jury which must be clearly convinced. However, this did not mean there could be no evidence to the contrary. The court added that "[t]he word 'cogent' . . . means impelling, appealing to one's reason, or convincing." *Id.* at 86. No other Missouri cases were found defining the phrase. Perhaps the most definitive judicial statement regarding the meaning of phrases such as "clear, precise and indubitable," or "clear and convincing," or "clear and satisfactory" is that of the court in Tapler v. Frey, 184 Pa. Super. Ct. 239, 244-45, 132 A.2d 890, 893 (1957):

> [These phrases] have a technical meaning which is that the witnesses must be found to be credible, that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct and weighty and convincing as to enable either a judge or a jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

These definitions should aid attorneys in preparing closing arguments. If the meaning of "clear and convincing" is properly explained to the jury, they will have little difficulty in understanding the state of mind they should have in order to find the higher burden of proof has been met. The definitions indicate that the jury should be "clearly convinced." They should be able to form the belief needed to return a verdict for the party with the burden of proof with less doubt and hesitancy than in other types of civil cases.

1. 538 S.W.2d 325 (Mo. En Banc 1976), *cert. denied*, 97 S. Ct. 639 (1976).

door after he returned. When he opened it, one of the five officers displayed his badge and asked to enter. According to the officer's testimony, Brasel indicated they could come in.[2] Upon request, defendant showed identification and was then placed under arrest.[3] A frisk revealed a quantity of pills in Brasel's trouser pocket, and the search of an attache case sitting on a chair about four feet from defendant resulted in the discovery of thirty-one amphetamine capsules.

Brasel was charged with two counts of unlawful possession of controlled substances.[4] Count I was based on the possession of the pills found in his pockets, and Count II was based on pills in the attache case. Defendant was convicted before the St. Louis County Circuit Court on both counts.[5] The St. Louis District of the Missouri Court of Appeals affirmed the conviction on Count I, but reversed and remanded on Count II.[6] The Missouri Supreme Court, deciding the case as though on direct appeal, affirmed the convictions on both counts.[7] The court found that there was probable cause for the warrantless arrest[8] and that the search of the defendant and the attache case was within the scope of search incident to this lawful arrest.[9]

The search incident to arrest exception allows a search without a warrant of an arrestee and an area around him when the search is incident

2. The case presents a situation where officers entered a private room to make a warrantless arrest when they had ample time to secure a warrant. The court did not have to face the question of the propriety of such an act, for the court decided that the defendant consented to the officers' entry; however, judicial controversy has arisen over the issue of whether the fourth amendment precludes entry by officers into a private dwelling to effect a warrantless arrest. The United States Supreme Court has not fully resolved the question. *See generally* United States v. Watson, 423 U.S. 411 (1976); United States v. Santana, 96 S. Ct. 2406 (1976). Recently the California Supreme Court held that absent exigent circumstances such arrest was forbidden by the fourth amendment. People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976). Missouri cases have allowed entries to make warrantless arrests without the arrestee's consent if the officer has given notice of his purpose and has been refused admittance. State v. Tomlin, 467 S.W.2d 918 (Mo. 1971); State v. Novak, 428 S.W.2d 585 (Mo. 1968), State v. Vineyard, 497 S.W.2d 821 (Mo. App., D. Spr. 1973). Section 544.200 RSMo 1969, provides for entry to make "arrests" under these circumstances.

3. The lawfulness of a warrantless arrest must be based on probable cause. Carroll v. United States, 267 U.S. 132 (1925). The *Brasel* court concluded that probable cause may be based upon legally obtained information, independent of that illegally gained, when both are within the knowledge of the officer. In *Brasel* the police legally gained information from the motel manager and the license check. However, the information they obtained from their own viewing of the room was the result of an illegal entry and could not be a basis for probable cause to arrest.

4. 538 S.W.2d at 326.

5. *Id.*

6. *Id.* at 327.

7. *Id.*

8. *Id.* at 331.

9. *Id.* at 332.

to a lawful, custodial arrest. The exception was first articulated in dictum referring to search of "the person."[10] It was expanded to include search of the person and the "place where the arrest is made,"[11] and under its broadest interpretation allowed a search of both the arrestee and the "premises" where the arrest occurred.[12] In 1969, the Supreme Court decided *Chimel v. California*,[13] overruling earlier decisions and limiting the scope of search incident to arrest.

The *Chimel* decision limited the scope of search to the person of the arrestee and the area "within which he might gain possession of a weapon or destructible evidence."[14] The Court held that protection of the officer, prevention of a means of escape, and preservation of evidence justify this exception to the fourth amendment warrant requirement.[15]

The Missouri Supreme Court held that the search in *Brasel* did fall within the limits prescribed by *Chimel*.[16] There are significant features in the court's interpretation of what is "within" the arrestee's "immediate control." Attention should first be focused on the court's approach to who bears the burden of proving the search incident to arrest exception. Both federal and Missouri cases have held that the burden of proving an exception to the search warrant requirement is on those seeking exemption from it.[17] However, in *Brasel*, the court failed to make the state bear this entire burden. In concluding that the attache case was within the defendant's control, the court stated:

> The evidence indicated that the attache case was on a chair perhaps four feet from the defendant . . . . There were other officiers in the room at the time, but no evidence was introduced that they were so placed that it was impossible for defendant to reach and enter the attache case. At some point, defendant was handcuffed but the evidence does not show that this had occurred prior to search of the attache case. On the record before us, we cannot conclude that defendant could not, by a quick movement, reach the attache case and obtain a weapon concealed therein or destroy evidence contained in the case.[18]

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10. Weeks v. United States, 232 U.S. 383, 392 (1914).

11. Agnello v. United States, 269 U.S. 20, 30 (1925).

12. United States v. Rabinowitz, 339 U.S. 56 (1950). *Rabinowitz* allowed the thorough warrantless search of a one-room office as a search incident to arrest. The test used was not whether it was reasonable to procure a warrant, Trupiano v. United States, 334 U.S. 699 (1948), but whether the search itself was reasonable. In Harris v. United States, 331 U.S. 145 (1947), the Court upheld the warrantless search of a four-room apartment as one incident to arrest.

13. 395 U.S. 752 (1969).

14. *Id.* at 763.

15. *Id.* at 764.

16. 538 S.W.2d at 332.

17. United States v. Jones, 475 F.2d 723 (5th Cir. 1973); United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976); State v. Sutton, 454 S.W.2d 481 (Mo. En Banc 1970).

18. 538 S.W.2d at 332.

The only evidence introduced by the state was that the distance between defendant and the attache case was four feet. No evidence was introduced as to defendant's actual ability to reach the case; *i.e.*, there was no showing by the state of the officers' position in relation to the defendant nor of when Brasel was restrained by handcuffs. By requiring the state to prove only that the arrest was lawful and that the case was four feet from the arrestee, the court effectively shifted the burden to the defendant to prove that the search *did* exceed the permissible bounds. Such a view did not apply the general rule that the exception is to be proven by the one invoking it.

Requiring the state to prove only distance rather than the arrestee's actual ability to gain access to the item is to adopt an "area"[19] or "physical proximity"[20] approach to the determination of the scope incident to arrest. The area test focuses on the arrestee's "hypothetical ability to reach the area searched,"[21] without regard to his actual ability to do so. This approach sacrifices the rationale of *Chimel*, which was to limit the scope of the search to the justification for the search. If there is no real danger of the arrestee gaining access to weapons, evidence, or a means of escape, then the distance between him and the item becomes immaterial. Thus, it can be argued that the area test differs only in degree from pre-*Chimel*, property-related decisions that allowed a search of the "premises,"[22] and that there is still license for exploratory searches, albeit ones of substantially delimited parameters.[23]

Also apparent from *Brasel* and previous Missouri opinions is the fact that Missouri courts have failed to recognize that challenged searches may occur in three different situations: at the time of the arrest of the person, after the person has been taken into custody and restrained, and when special circumstances are involved; *e.g.*, where an arrestee will be allowed to drive himself to the police station after the arrest. Missouri courts have treated these three situations as involving the same problem, failing to realize that each calls for a different solution to the determination of what is within the scope of search.

In the situation involving special circumstances such as those existing when police intend to allow an arrestee to drive to the station, there is justification for a search of the area in the car within his immediate control even if the driver is out of the car. The search is justified because it

19. Cook, *Warrantless Searches Incident to Arrest*, 24 ALA. L. REV. 607, 621 (1972).

20. Comment, *The Permissible Scope of a Premises Search Incident to Arrest Under Chimel v. California: Divergent Definitions of "Immediate Control" Plague the Lower Courts*, 9 LOY. L.A.L. REV. 350, 356 (1976).

21. *Id.*

22. *See* United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States 331 U.S. 145 (1947).

23. Cook, *supra* note 19, at 622.

prevents his gaining access to weapons or evidence when he gets back into the auto. This is true despite the arrestee's inability to reach the items at the time of the search.

Another situation exists in a search made when there are no special circumstances and the person has been arrested but not restrained. If the state establishes that the arrest was lawful and that the search was made when there has been only an arrest, the hypothetical ability of the arrestee to reach the item is important, and proof as to distance is indicative of what is within his immediate control. In the *Brasel* case, the state did offer evidence of distance, and other Missouri decisions have likewise recognized that the state bears the burden of proving distance. In *State v. Wiley*[24] the defendant followed officers to the doorway of a kitchen where they seized controlled substances from a refrigerator. The court, in holding the search not incident to arrest stated: "There is no showing that the persons were so near the refrigerator that the search and seizure of the substance could be a lawful search incident to arrest."[25] In a similar case, the search of a dresser drawer in the bedroom where defendant was arrested was struck down. The court said that the only person present in the room when the search began was defendant's wife, and there was no showing by the state that she was "close enough to the dresser . . . that she might have been able to grab a weapon or destructible evidence."[26] These decisions emphasize the importance the Missouri courts place on distance in deciding what is within an arrestee's immediate control. Where only an arrest has occurred, the distance or area the arrestee can hypothetically reach is properly the issue.

Missouri courts have treated the situation where the person has been taken into custody and restrained as involving the same problem as where only an arrest has occurred and have employed the area approach despite the arrestee's inability to actually reach an item. When the arrestee has been restrained, the rationale for allowing a search of the area, which exists where there has been only an arrest of the person, is no longer present. However, in regard to what must be proven by the state, Missouri courts have failed to distinguish the two situations. In *State v. Kent*[27] defendant was arrested while claiming three suitcases from a taxi stand at a train station.[28] He was then taken to a security office at the station where one suitcase was opened. The others were opened later at police headquarters. The defendant argued that at the time of the search he was under police guard, had been manacled, and was separated from the cases. The court rejected his contention and cited *State v. Boyd*.[29] *Boyd* upheld a search

24. 522 S.W.2d 281 (Mo. En Banc 1975).
25. *Id.* at 290.
26. State v. Funk, 490 S.W.2d 354, 359 (Mo. App., D.K.C. 1973).
27. 535 S.W.2d 545 (Mo. App., D.K.C. 1976).
28. It is not clear from the facts whether he had actually gotten physical possession of the suitcases he was attempting to claim. *Id.* at 547.
29. 492 S.W.2d 787 (Mo. 1973).

incident to arrest as within the *Chimel* rule when an attache case was taken from the defendant upon his arrest and not examined until he was led 150 feet from the case. Other Missouri cases have reached similar results.[30]

The *Brasel* court possibly was faced with a situation like those above where more than an arrest occurred; however, they chose to require the state to offer evidence only as to distance and to place upon the defendant the burden of proving that the case was not within his immediate control. Chief Judge Seiler's dissenting opinion recognized that more was involved than a search carried out when only arrest of the person had occurred. He suggested that in deciding what was within the arrestee's immediate control, the burden be upon the state to show that he could have actually reached the item.[31] This would make the state bear the entire burden of proving the exception to the warrant requirement and would force the court to review the actual circumstances, a requirement more in keeping with the intent of *Chimel*. Chief Judge Seiler's suggestion would mesh well with what commentators have termed the "factual analysis"[32] or "purposive"[33] approach to defining what is within an arrestee's immediate control. It focuses on his actual ability to reach a particular item in light of the facts presented.[34] This test recognizes that *Chimel* sought to make a change in purpose, not mere degree, and would limit the exception to the justification for it. In reviewing the facts, the courts would examine the number of officers present, the position of the officers in relation to the arrestee, the physical restraints placed on the arrestee, and the physical abilities peculiar to him.[35]

The *Brasel* case was before the St. Louis Court of Appeals before transfer to the supreme court. The court of appeals found that the search of the briefcase was not incident to the arrest within the meaning of *Chimel*. The opinion reflects an adherence to the factual analysis approach. The court referred to the rationale underlying the *Chimel* decision, and approached the question of the scope of search from a practical standpoint and in "terms of accessibility."[36] Quoting from *United States v. Jones*,[37] the court stated:

> In essence, the approach to a claim that a search was incident to an arrest is for the court to examine the facts and make an objective determination of a rather subjective question: could the law enforcement officials on the scene reasonably expect the arrested

30. State v. McCollum, 527 S.W.2d 710 (Mo. App., D.K.C. 1975); State v. Venezia, 515 S.W.2d 492 (Mo. En Banc 1974).
31. 538 S.W.2d at 333.
32. Comment, *supra* note 20, at 357.
33. Cook, *supra* note 19, at 621.
34. Comment, *supra* note 20, at 357.
35. *Id.* at 368.
36. State v. Brasel, No. 36032 (Mo. App., D. St. L., July 22, 1975).
37. 475 F.2d 723 (5th Cir. 1973).

person to gain hold of a weapon or evidence in the area searched.[38]

Deciding whether officials could "reasonably expect" the defendant to gain access to weapons or evidence within the area searched necessarily requires a factual analysis approach. In showing this reasonable expectation, the burden would be on the state to show the arrestee could have reached an item.

In *Brasel* the supreme court chose neither to follow the recommendations of Chief Judge Seiler nor those of the court of appeals, despite the fact that their reasoning followed the intent of *Chimel*. The court instead adopted an area approach. Thus, while officers will be limited to an area which they may search, the opinion would seem to nearly eliminate the necessity of determining whether lives or evidence were actually in danger or of distinguishing between a search carried out when only arrest of the person had occurred and one done after the person had been restrained. A possible extension of the opinion would eliminate the need for the arrestee's presence at the time of the search; *i.e.*, the police might return later and search a hypothetical area radiating from the point where the arrest occurred. The opinion will affect the burden of proof placed on prosecutors, and this area approach, which will result in upholding more searches, will affect police conduct to the extent that the exclusionary rule can be said to do so.[39] While the decision may mean the conviction of more offenders, the supreme court has paid only lip service to *Chimel* in reaching a result-oriented decision.

BOBETTE SANDERS

38. State v. Brasel, No. 36032 (Mo. App., D. St. L., July 22, 1975). The dissent in the *Brasel* opinion in the court of appeals expressed sentiments like those of the majority opinion of the Missouri Supreme Court. The dissent stated that the briefcase was within the defendant's immediate control and that there was no showing that he could not have reached for weapons or destroyed evidence. This reasoning again places the burden on the defendant to prove that he could not have reached weapons or evidence.

39. Courts have stated that the exclusionary rule deters police from conducting unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 12 (1968); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965); Mapp v. Ohio, 367 U.S. 643, 656 (1961). However, other authorities have stated that the rule deters police conduct only in certain instances or not at all. *See* Canon, *Is The Exclusionary Rule in Failing Health Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY L. J. 681 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J. OF L. & SOC. PROBS. 87 (1968).