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SEARCH OF AUTOMOBILE AFTER ARREST FOR A TRAFFIC VIOLATION

The extent to which a police officer may search an automobile has always posed a difficult problem in the law of search and seizure since an automobile and any evidence it contains may be easily moved out of the grasp of law officers.¹ Since 1961 and the extension of the federal exclusionary rule to all state criminal prosecutions,² this problem has become more acute. States which have not had to face the problem must now establish standards by which it may be determined whether a search is proper.³ In developing these standards, two

¹"We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll v. United States*, 267 U.S. 132, 153 (1925). A warrant is not necessary when it is impractical, but if "the securing of a warrant is reasonably practicable, it must be used. . . ." *Id.* at 156. Where the car is in the custody of the police and the defendant no longer has access to it, a warrant should be required, because the car can no longer be moved from the jurisdiction. See *Commonwealth v. Lewis*, 309 Ky. 276, 217 S.W.2d 625 (1949); *People v. Carr*, 370 Mich. 251, 121 N.W.2d 449 (1963); *Contra, People v. Baker*, 135 Cal. App. 2d 1, 286 P.2d 510 (Dist. Ct. App. 1955). In this case, the defendant was in jail on charges of drunk driving, and the car was in a garage. The officer returned to the garage, searched the car, and found a gun. The conviction for possession of firearms was affirmed on the grounds that since the car was in the legal possession of the police, the gun was also.

²The exclusionary rule was first established in *Weeks v. United States*, 232 U.S. 383 (1914). This decision barred the use of evidence in a federal prosecution if it was secured through an illegal search. In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held that, although the Fourth Amendment right to be protected from illegal search and seizure was applicable to states, the Fourteenth Amendment did not prohibit the use of illegally obtained evidence in a state criminal proceeding. The question in *Wolf* was again presented to the Court in *Mapp v. Ohio*, 367 U.S. 643 (1961). In this case, the Court held that evidence obtained by an illegal search was not admissible. *Wolf* was overruled so far as it was inconsistent with this decision. "Having once recognized the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise." *Id.* at 660. The first case after *Mapp* was *Ker v. California*, 374 U.S. 23 (1963). It indicated that there could be instances where evidence that would be excluded from federal prosecutions would be admissible in state actions, but neither *Ker* nor the most recent case of *Aguilar v. Texas*, 378 U.S. 108 (1964), involved such a situation. This point has still not been fully developed by the Court.

³At the time of *Mapp v. Ohio*, 367 U.S. 643 (1961), about one half of the states

basic questions must be answered: (1) When is a search proper? (2) What areas of the car may be searched?

In the recent decision of *Lane v. Commonwealth*,⁴ the defendant was arrested by a state trooper for improper passing. It then developed that he did not have a driver's license. After the arrest, the trooper searched the defendant and placed him in the police car. While waiting for a wrecker to tow the defendant's car away, apparently because the defendant could not legally drive it, the police officer returned to defendant's car, searched it, and found seven cases of whiskey in the trunk. The defendant was indicted for the offense of transporting alcoholic beverages for the purpose of sale in a dry territory. At the trial, the defendant's motion to suppress the evidence obtained as a result of the search was overruled, and he was convicted. On appeal, the court held that the search was illegal, and the conviction was reversed. The court stated:

"It is our opinion that when a person is arrested for a traffic violation or other minor violation the mere fact of the arrest does not give to the officer absolute right to search the vehicles or premises indiscriminately. It would be impossible to lay down a rule which would apply to all conditions and all states of facts and this opinion should not be construed to mean that a person in custody may not be searched in order to be disarmed, or to prevent escape or the immediate destruction of evidence for which he was detained."⁵

Lane adopts the rule which is generally followed in other jurisdictions⁶ that a search is not permitted merely because there has been an arrest, but it does permit an investigatory search if the arresting officer believes:

- (1) that the defendant is armed or might attempt to escape; or
- (2) that the defendant may destroy evidence which is the fruit or implement of the crime for which he was arrested.

Neither of these circumstances appreciably increases the authority

had adopted the exclusionary rule. They were: California, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming. See appendix to *Elkins v. United States*, 364 U.S. 206, 224 (1960); 8 Wigmore, Evidence § 2183 n.1 (McNaughton ed. 1961).

⁴386 S.W.2d 743 (Ky. 1964).

⁵Id. at 745.

⁶E.g., *Preston v. United States*, 376 U.S. 364 (1964); *People v. Mickelson*, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963); *Brinegar v. State*, 97 Okla. Crim. 299, 262 P.2d 464 (1953); *People v. Thomas*, 31 Ill. 2d 212, 201 N.E.2d 413 (1964).

of an officer in conducting a search after an arrest for a traffic violation.⁷

⁷Since use of a search warrant is not always practical when automobiles are involved, most searches must be conducted without a warrant. A search without a warrant is permitted if it is incident to a valid arrest. "[A] search without a warrant incident to an arrest is dependent initially on a valid arrest." *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950). *Ortiz v. United States*, 317 F.2d 277 (5th Cir. 1963); *Mardis v. Superior Court*, 218 Cal. App. 2d 70, 32 Cal. Rptr. 263 (Dist. Ct. App. 1963); *People v. Carr*, 370 Mich. 251, 121 N.W.2d 449 (1963); *South Euclid v. Palladino*, 93 Ohio L. Abs. 24, 193 N.E.2d 560 (Munic. Ct. 1963); *McCormick v. State*, 277 P.2d 219 (Okla. Crim. App. 1954).

Under the law of arrest, an arrest for a misdemeanor is proper only if the misdemeanor is committed in the presence of a police officer. *Adair v. Williams*, 24 Ariz. 422, 210 Pac. 853 (1922); *Orick v. State*, 140 Miss. 184, 105 So. 465 (1925); *Shirey v. State*, 321 P.2d 981 (Okla. Crim. App. 1958); *State v. Reichman*, 135 Tenn. 653, 188 S.W. 225 (1916); 4 *Wharton, Criminal Law & Procedure* § 1597, at 247 (Anderson ed. 1957); *Orfield, Criminal Procedure from Arrest to Appeal*, 19 (1947). Reasonable belief is sufficient to arrest for the commission of a felony, *Carroll v. United States*, 267 U.S. 132 (1925); *People v. Kilvington*, 104 Cal. 86, 37 Pac. 799 (1894); *Robinson v. State*, 93 Ga. 77, 18 S.E. 1018 (1893); *Grace v. Forge*, 183 Ky. 521, 209 S.W. 369 (1919); *Crosswhite v. Barnes*, 139 Va. 471, 124 S.E. 242 (1924); 4 *Wharton, Criminal Law & Procedure* § 1596 at 243 (Anderson ed. 1957), but is not sufficient grounds to arrest for the commission of a misdemeanor. *People v. Shapiro*, 213 Cal. App. 2d 618, 28 Cal. Rptr. 907 (Dist. Ct. App. 1963); *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954); *Brinegar v. State*, 97 Okla. Crim. 299, 262 P.2d 464 (1953). The federal courts have adopted a different view when dealing with motor vehicles. An arrest is permitted when there is probable cause even though it is not a felony. *Brinegar v. United States*, 338 U.S. 160 (1949); *Husty v. United States*, 282 U.S. 694 (1931); *Carroll v. United States*, 267 U.S. 132 (1925).

It does not seem necessary to place the defendant under formal arrest before the search is made. It is necessary, however, that valid grounds for an arrest exists at the time of the search. *People v. Gibson*, 220 Cal. App. 2d 15, 33 Cal. Rptr. 775 (Dist. Ct. App. 1963); *State v. Christensen*, 151 Ore. 529, 51 P.2d 835 (1935). The federal rule holds that once the car is stopped, the arrest has been made though no formal statement to that effect is made. "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." *Henry v. United States*, 361 U.S. 98, 103 (1959). *Accord, Robertson v. State*, 184 Tenn. 277, 198 S.W.2d 633 (1947). But see *People v. Mickelson*, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963), where the California court holds that the state can authorize officers to stop motorists for temporary investigatory detention though there is no reasonable cause to arrest the occupant. Since the rule in *Henry v. United States* was not determined on constitutional grounds, the court feels that temporary detention does not violate the Fourth Amendment as applied to the states through the Fourteenth Amendment.

"[I]t is generally held that the stopping of a motorist for investigation does not constitute an arrest since there is no 'taking into custody' and no purpose other than to check on the driver's license or to otherwise investigate him or the car. And the issuance of a traffic citation, a court summons, or subpoena is not an arrest, for here, too, there is no 'taking into custody.'" *Inbau & Sowler, Cases on Criminal Justice*, 513 (1960). Although there is no taking into custody, statutes authorizing the issuance of summons are phrased so that it appears the defendant is arrested and the only purpose of the summons is to release him from custody.

"Arrest for misdemeanor, release on summons and promise to appear; admitting

There are two extreme situations which mark the boundaries of the problem of searching an automobile after arrest for a minor traffic violation. Neither of these situations presents any difficulty. At one extreme is the situation in which the defendant has simply been stopped for a traffic violation, and there are no additional facts. In this case, the officer may only arrest the defendant and take him into custody or issue a summons. A search is not warranted and there is no right to conduct one, simply because there has been an arrest for a traffic violation.⁸ This is the basic and most fundamental rule in this area of search and seizure law. At the other extreme, is the situation where the police officer through the exercise of his senses:⁹ sees,¹⁰ hears,¹¹ or smells¹² something which gives him personal knowledge

to bail; violations. (a) Whenever any person is arrested for a violation of any provision of this title punishable as a misdemeanor the arresting officer shall, except as otherwise provided in § 46.1-179, take the name and address of such person and the license number of his motor vehicles and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, such time to be at least five days after such arrest unless the person arrested shall demand an earlier hearing, and such person shall, if he so desires, have a right to an immediate hearing or a hearing within twenty-four hours at a convenient hour, and before a court having jurisdiction under this title within the city, town or county wherein such offense was committed. Such officer shall thereupon and upon the giving by such person of his written promise to appear at such time and place forthwith release him from custody." Va. Code Ann. § 46.1-178 (Repl. Vol. 1958). Accord Ky. Rev. Stat. Ann § 281.765 (1963); Tenn. Code Ann. § 59-1019 (1955); Fla. Stat. Ann. § 30-56 (1961), § 321.05 (1957).

On arrest, see generally Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201 (1940); Note, 21 Wash. & Lee L. Rev. 249 (1964).

⁸"[T]he mere fact of arrest does not give to the officer absolute right to search the vehicle or premises indiscriminately." *Lane v. Commonwealth*, 386 S.W.2d 743, 745 (Ky. 1964). Accord, *People v. Thomas*, 31 Ill. 2d 212, 201 N.E.2d 413 (1964); *People v. Zeigler*, 358 Mich. 355, 100 N.W.2d 456 (1960); *Brinegar v. State*, 97 Okla. Crim. 299, 292 P.2d 464 (1953); *Elliot v. State*, 173 Tenn. 203, 116 S.W.2d 1009 (1938).

Professor Agata of Montana State University takes exception to the point that absent additional circumstances the fact of arrest for a minor traffic violation will never allow an incidental search. See Agata, *Searches & Seizures Incident to Traffic Violations—A Reply to Professor Simeone*, 7 St. Louis U.L.J. 1 (1962).

⁹"Trooper Righter was entitled to observe by 'exercise of his own senses' whatever thereby was disclosed." *People v. Kuntze*, 371 Mich. 419, 124 N.W.2d 269, 273 (1963); *Park v. United States*, 294 Fed. 776 (1st Cir. 1924); *Elrod v. Moss*, 278 Fed. 123 (4th Cir. 1921); *United States v. Rembert*, 284 Fed. 996 (S.D. Tex. 1922). Strictly speaking, evidence obtained through the exercise of one's senses is not a search.

¹⁰*United States v. Haley*, 321 F.2d 956 (6th Cir. 1963); *People v. Martin*, 140 Cal. App. 2d 387, 295 P.2d 33 (Dist. Ct. App. 1956); *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963).

¹¹*Pack v. United States*, 294 Fed. 776 (1st Cir. 1924); *Shafer v. State*, 151 Tex. Crim. 558, 209 S.W.2d 599 (1948); *Manriques v. State*, 291 S.W. 231 (Tex. Crim. App. 1926).

¹²*Fernandez v. United States*, 321 F.2d 283 (9th Cir. 1963); *Mardis v. Superior Court*, 218 Cal. App. 2d 70, 32 Cal. Repr. 263 (Dist. Ct. App. 1963); *People v. Baker*,

that a crime other than the traffic offense is being committed. This knowledge gives the police officer probable cause, which allows a search of the car without a warrant.¹³ Thus, if a person is stopped for speeding and the officer sees illegal alcohol in the back seat, the car may be searched, the liquor seized, and all evidence obtained as a result of the search and seizure may be used at trial.¹⁴

Although these two extremes do not present any real problem, the area in between does. The first exception to the rule that there is no right to make a search just because there has been an arrest arises when the police officer believes that the defendant is armed or might attempt to escape. Then he may search the car, but only for the purpose of disarming the defendant or preventing his escape. Generally,

135 Cal. App. 2d 1, 286 P.2d 510 (Dist. Ct. App. 1955); *Bagwell v. State*, 327 P.2d 479 (Okla. 1958).

¹³A vehicle on the highway may be searched without a warrant when probable cause for the search exists. "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *Carroll v. United States*, 267 U.S. 132, 158 (1925). Thus, while a search without a warrant may be made even when the search is not an incident of an arrest, the standard is the same as would be required to obtain a warrant. There must be probable cause. "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Henry v. United States*, 361 U.S. 98, 102 (1959). "*Carroll v. United States* . . . liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirement for a warrant on the grounds of practicality. It did not dispense with the need for probable cause." *Id.* at 104.

¹⁴"[T]he legally discovered whiskey opened the gate for a quest otherwise barred." *Brinegar v. State*, 97 Okla. Crim. 299, 262 P.2d 464, 480 (1953). After the initial arrest for a minor violation, an officer may determine that the driver is intoxicated. E.g., *Mardis v. Superior Court*, 218 Cal. App. 2d 70, 32 Cal. Rptr. 263 (Dist. Ct. App. 1963); *State v. Halko*, 188 A.2d 100 (Super. Ct. Del. 1962); *State v. Giles*, 254 N.C. 499, 119 S.E.2d 394 (1961). The officer may see alcohol, as in *United States v. Haley*, 321 F.2d 956 (6th Cir. 1963); *Koscielski v. State*, 199 Ind. 546, 158 N.E. 902 (1927); *Berry v. State*, 197 Ind. 212, 150 N.E. 315 (1926); *People v. Kuntze*, 371 Mich. 419, 124 N.W.2d 269 (1963); *State v. Christensen*, 151 Ore. 529, 51 P.2d 835 (1935); *State v. Taft*, 110 S.E.2d 727 (W. Va. 1959); or other contraband in the car, as in *People v. Martin*, 140 Cal. App. 2d 387, 295 P.2d 33 (Dist. Ct. App. 1956) (green botanical substance which looked like marijuana); *People v. Kuntze*, 371 Mich. 419, 124 N.W.2d 269 (1963) (leg of deer protruding from under the seat); *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963) (weapon partially concealed under driver's leg). The arresting officer may see the driver attempt to hide something. *People v. One 1958 Chevrolet Impala*, 219 Cal. App. 2d 18, 33 Cal. Rptr. 64 (Dist. Ct. App. 1963); *People v. Shapiro*, 213 Cal. App. 2d 618, 28 Cal. Rptr. 907 (Dist. Ct. App. 1963); *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956). While making a limited investigatory search incident to the initial arrest, evidence of another crime may be found. *People v. Witt*, 159 Cal. App. 2d 492, 324 P.2d 79 (Dist. Ct. App. 1958); *People v. Thomas*, 31 Ill. 2d 212, 201 N.E.2d 413 (1964); *Brinegar v. State*, 97 Okla. Crim. 299, 262 P.2d 464 (1953); *Duncan v. States*, 191 Tenn. 427, 234 S.W.2d 835 (1950); *State v. Olsen*, 43 Wash. 2d 726, 263 P.2d 824 (1953).

a search for this purpose may be conducted when the situation confronting the officer reasonably indicates that the defendant might be armed.¹⁵ If the person arrested is recognized as a wanted criminal,¹⁶ or if the police have been informed that the defendant was armed,¹⁷ the officer would be justified in searching the car for weapons. A search for weapons has also been allowed where the defendant was a persistent law violator,¹⁸ or where he is known to have been convicted previously and to be a dangerous person.¹⁹ Although the facts of each case will determine whether there may be a search, there must be an additional factor which would put a reasonable person on notice that the defendant is armed and constitutes a threat to the safety of the officer.²⁰ In developing this rule, the courts must not only guarantee the safety of the police, but must also protect the public by preventing this rule from becoming a subterfuge for allowing unjustified searches.²¹

The second question presented is what areas of the car may be

¹⁵"When, however, the circumstances reasonably indicate that the police may be dealing not with the ordinary traffic violator but with a criminal, then a search of the driver and his vehicle is authorized in order to insure the safety of the police officers and to prevent an escape of the might-be criminal." *People v. Thomas*, 31 Ill. 2d 212, 201 N.E.2d 413, 414 (1964). "It is insisted that before the right to search for firearms accrued to the officers they must have reasonable ground for such action. With this we agree." *Brinegar v. State*, 97 Okla. Crim. 299, 262 P.2d 464, 480 (1953); *People v. Mickelson*, 59 Cal. 2d 488, 380 P. 2d 658, 30 Cal. Rptr. 18 (1963); *People v. Gonzales*, 356 Mich. 247, 97 N.W.2d 16 (1959); *Duncan v. State*, 191 Tenn. 427, 234 S.W.2d 835 (1950).

¹⁶*People v. Cantley*, 163 Cal. App. 2d 762, 229 P.2d 993 (Dist. Ct. App. 1958) (defendant fitted description of murder suspect); *People v. Witt*, 159 Cal. App. 2d 492, 324 P.2d 79 (Dist. Ct. App. 1958) (recognized defendant as a known drug addict, thief, and suspected burglar).

¹⁷*People v. Jiminez*, 143 Cal. App. 2d 671, 300 P.2d 68 (Dist. Ct. App. 1956); *State v. Hoover*, 219 Ore. 288, 347 P.2d 69 (1959).

¹⁸*Edwards v. State*, 319 P.2d 1021 (Okla. Crim. App. 1957).

¹⁹*Duncan v. State*, 191 Tenn. 427, 234 S.W.2d 835 (1950).

²⁰It is clear that where the officer knew the defendant and knew he was not dangerous there were no grounds for a search. *Stevens v. State*, 274 P.2d 402 (Okla. Crim. App. 1954); *Mervin v. State*, 277 P.2d 208 (Okla. Crim. App. 1954). The problem with this limitation is one of proof. The defendant will have a difficult time showing that the officer only suspected trouble and did not have reasonable belief to fear that the defendant was armed.

²¹"An arrest may not be used as a pretext to search for evidence." *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932); *Collins v. State*, 65 So. 2d 61 (Fla. 1953); *Brown v. Sattre*, 62 So. 2d 348 (Fla. 1952); *Robertson v. State*, 184 Tenn. 277, 198 S.W.2d 633 (1947); *Cox v. State*, 181 Tenn. 344, 181 S.W.2d 338 (1944).

If any traffic violation would permit a search no one would be safe because "traffic regulations as a whole are so complicated now in cities and towns and even out on highways that it requires a very alert person indeed to escape violating some of the rules and regulations at some time." *Brinegar v. State*, 97 Okla. Crim. 299, 262 P.2d 464, 474 (1953).

searched in order to find weapons and thereby prevent an escape. The general rule is that the areas which are readily accessible to the defendant may be searched.²² Since the purpose of the search is solely for the protection of the officers, there should not be a search of areas which are inaccessible to the defendant. This would preclude searching the trunk,²³ under the back seat, or under the hood. It would probably preclude searching a locked glove compartment,²⁴ since it would seem improbable that a person could unlock a glove compartment and pull out a weapon while the officer is beside him. If the defendant gets out of his car or is taken to the police car, there does not appear to be any reason for allowing a search of the car for weapons, since there is not any area of the car that is readily accessible to him.

The first exception to the rule that there is not an absolute right to search an automobile after an arrest does not widen the scope of permissible searches very much. It will be the unusual case when a police officer can search because he believes that the defendant might be armed. Ordinarily, there would not be reasonable grounds for believing that the defendant is armed, and even if there are sufficient grounds, the area which may be searched is limited to those readily accessible to the defendant.

The second exception to the basic rule that a search cannot be made, simply because there is an arrest, allows a search if the officer believes that the defendant may destroy evidence, which is itself the fruit or an implement of the crime for which he was arrested. This situation will seldom give an officer the right to search, because it is apparent that few traffic violations will involve fruits or implements of the crime.²⁵ When a person is arrested for speeding, there will not

²²Preston v. United States, 376 U.S. 364 (1964); People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963); Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464 (1953).

²³Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464 (1953); Elliot v. State, 173 Tenn. 203, 116 S.W.2d 1009 (1938).

²⁴See Simeone, Search & Seizure Incident to Traffic Violations, 6 St. Louis U.L.J. 506, 518 (1960); 43 Ky. L.J. 163, 165 (1955).

²⁵In such situations these would be no grounds for a search. People v. Moray, 222 Cal. App. 2d 743, 35 Cal. Rptr. 432 (Dist. Ct. App. 1963) (did not stop at stop sign, made illegal left turn); Burley v. State, 59 So. 2d 744 (Fla. 1952) (passing on a curve); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960) (parking too close to cross walk); People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456 (1960) (failing to stop for stop sign); People v. Gonzales, 356 Mich. 247, 97 N.W.2d 16 (1959) (only one head light burning).

Generally, the police may stop a car and require the driver to show his license. This must be done in good faith and not used as an excuse to avoid restriction against search and seizure. Morgan v. Town of Heidelberg, 246 Miss. 481, 150 So. 2d 512 (1963); Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1947); see also

be any evidence in the vehicle which the defendant must be prevented from destroying, since the only evidence will be the direct testimony of the arresting officer.²⁶ In fact, nearly all minor traffic violations will be of this type; therefore, there is almost no situation which would allow a search of the car in order to find evidence.²⁷ The only obvious example of a traffic violation where there could be evidence in the car is an arrest for drunken driving, whereby the officers would be entitled to search the vehicle.²⁸

In the rare case where evidence could be found in the car, the courts have allowed the search to be extended for the purpose of preventing the destruction of evidence which is the fruit or implement of the crime for which the defendant is arrested; the purpose is not to find such evidence. It would seem this purpose could be accomplished by limiting the search to those areas easily accessible to the defendant.²⁹ Thus, the extent of the search would be limited to that allowed when the search is to disarm the defendant. The courts, however, have uniformly rejected limiting the search and have allowed the police to search the entire car including the trunk.³⁰ The damaging effect of the courts' ruling is limited, however, since few traffic violations would involve the presence of additional evidence.

Even in a search permitted in order to disarm and prevent escape or to prevent destruction of evidence an additional limitation is imposed. Such a search is reasonable only if it is incident to a valid arrest,

Annot., 154 A.L.R. 812 (1945), on the Effect of Ulterior Motive in Exercising Authority to Require Motorists to Exhibit Driver's License.

As to use of road blocks as a means of searching a car, see 46 Iowa L. Rev. 802 (1961).

²⁶"[T]here could ordinarily be no evidence contained in the motor vehicle which could afford proof that the motorist ran a red light, or speeded." *Stevens v. State*, 274 P.2d 402, 407 (Okla. Crim. App. 1954).

²⁷The defendant can always consent to the search and thereby waive his rights. To waive his rights the defendant must be cognizant of them and the consent must be voluntary. The defendant cannot be said to have voluntarily consented if he does it under strong pressure and coercion from the police. See 4 Wharton, Criminal Law and Procedure § 1578 at 214 (Anderson ed. 1957). For an interesting situation involving question of whether the consent was, in fact, freely given, see *Davis v. United States*, 328 U.S. 582 (1946). Mr. Justice Frankfurter severely attacks the majority's finding that the waiver was voluntary. *Id.* at 594.

²⁸*Mardis v. Superior Court*, 218 Cal. App. 2d 70, 32 Cal. Rptr. 263 (Dist. Ct. App. 1963); *People v. Baker*, 135 Cal. App. 2d 1, 286 P.2d 510 (Dist. Ct. App. 1955); *Stevens v. State*, 274 P.2d 402 (Okla. Crim. App. 1954).

²⁹Mr. Justice Frankfurter asserts this view and would limit the search for evidence to what is necessary to prevent destruction of the evidence. See Frankfurter's dissents in *Davis v. United States*, 328 U.S. 582, 594 (1946); *Harris v. United States*, 331 U.S. 145, 155 (1947); *United States v. Rabinowitz*, 339 U.S. 56, 58 (1950).

³⁰See supra note 28; 1959 Wis. L. Rev. 347, 354.

and it is incident to an arrest only if the time and place of the search are closely related to the arrest.³¹ In *Preston v. United States*,³² a search to find evidence of the crime was held to be invalid because the defendant was in jail and the car was in police custody. The Court stated:

"The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be 'fruits' or 'implements' of the crime of vagrancy. . . . Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. . . . We think that the search was too remote in time or place to have been made incidental to the arrest and conclude, therefore, that the search of the car without warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible."³³

It appears, therefore, that a search which otherwise would have been valid may be held improper if it is not incident to the arrest.

A search of a vehicle after an arrest for a traffic violation is narrowly limited. In order to be able to conduct any search, the officer must have had grounds for believing that the defendant was armed and might attempt to escape, or that there was evidence of the crime which the defendant might destroy. Any search which is allowed in order to disarm the defendant must be limited to the areas easily accessible to him. There is no such limitation if the search is to prevent destruction of evidence, but there are almost no situations where there could be any evidence in the car. Those searches which are permitted are further limited by the fact that they must be made as an incident of the arrest and not at some remote time or place. While the language used in *Lane v. Commonwealth* might seem rather liberal in its ap-

³¹A search and seizure incident to a lawful arrest is not unreasonable and does not violate the Fourth Amendment. *United States v. Rabinowitz*, 339 U.S. 56 (1950). A search can be incident to an arrest only if it is approximately contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *Stoner v. California*, 376 U.S. 483 (1964).

³²376 U.S. 364 (1964).

³³*Id.* at 368. The rule of *Preston v. United States* was applied in *People v. Erickson*, 31 Ill. 2d 230, 201 N.E.2d 422 (1964) and *People v. Catavdella*, 31 Ill. 2d 382, 202 N.E.2d 1 (1964).