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POLICE OFFICER'S HANDBOOK

SEARCHES OF TRAFFIC OFFENDERS...SUPREME COURT RULINGS

(Robinson and Gustafson Cases)

PRELIMINARY HEARINGS

PRODUCTION OF INFORMERS OR AGENTS

WHAT THE STATE MUST PROVE

FLEMING'S NOTEBOOK...Chapter 96

Seizures of Film - Liability of Police Officers
Baggage Search by Airport Employees
Identification of Defendant by Victim
Identification by Photograph
Search of Transient Hotel Room

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LAW ENFORCEMENT - ETV TRAINING PROGRAM

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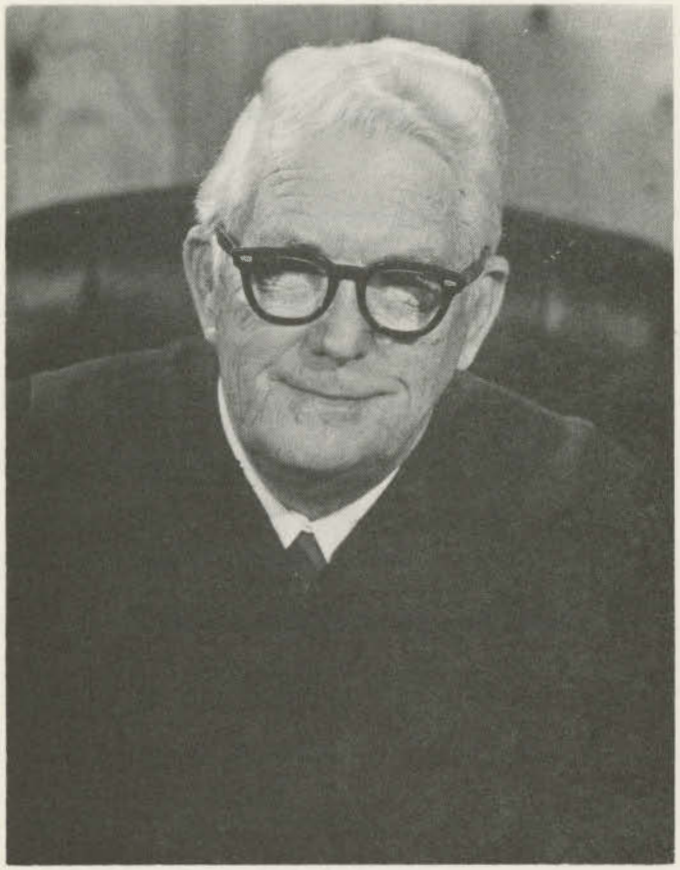

Hon. James B. Morrison
Resident Judge
Fifteenth Judicial Circuit

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FOREWORD

Without question, it has become more and more dangerous for law enforcement officers when they are called upon in line of duty to stop motorists on our streets and highways. Last month in Denver, Colorado, a 31-year-old State highway patrolman was shot four times in the back of the head by the companion of whom he had stopped for a minor traffic offense. The officer died instantly, of course.

In such times, it is natural that every officer should take every lawful precaution to protect himself when he is exposed to such dangers. In order to do so effectively, however, the officer must be absolutely sure, almost instinctively, of the laws governing his authority in such situations. When he is not sure, uncertainty can lead to disaster.

Any police officer...in any situation...can act much more decisively and professionally when he knows both the authority he has under the law and the restrictions placed upon him by the law. Every

pertinent court decision handed down on the subject by the United States Supreme Court, the South Carolina Supreme Court, and the Fourth Circuit Court of Appeals in Richmond, should be made known immediately to every police officer in this State, and interpreted for him in detail.

I congratulate the Crime-to-Court Series on its past performance in this area.

The preliminary hearing is an important part of our judicial procedure. Unfortunately, its basic purpose is frequently overlooked or is not known, and, as a result, effective prosecution of serious crimes in general sessions courts and county courts if often hampered by things done at a preliminary hearing that should not have entered into the picture at all in magistrate's court.

In this booklet, we shall discuss some of the more important questions that lead to problems at preliminary hearings.

James B. Morrison
Resident Judge
Fifteenth Judicial Circuit

PRELIMINARY HEARINGS

The law of South Carolina gives to every person charged with a general sessions court offense in an arrest warrant the right to a preliminary hearing before a magistrate to determine whether or not the warrant was issued lawfully, that is...whether or not the State has evidence to constitute probable cause of guilt.

PRELIMINARY EXAMINATIONS

WHEN AND HOW DEFENDANT MAY DEMAND PRELIMINARY EXAMINATION. "Any magistrate who issues a warrant charging a crime beyond his jurisdiction shall grant and hold a preliminary investigation of it upon the demand in writing of the defendant made at least ten days before the convening of the next court of general sessions, at which investigation the defendant may cross-examine the State's witnesses in person or by counsel, have the reply in argument if there be counsel

for the State, and be heard in argument in person or by counsel as to whether a probable case has been made out and as to whether the case ought to be dismissed by the magistrate and the defendant discharged without delay. When such a hearing has been so demanded the case shall not be transmitted to the court of general sessions or submitted to the grand jury until the preliminary hearing shall have been had, the magistrate to retain jurisdiction and the court of general sessions not to acquire jurisdiction until after such preliminary hearing."

Even when the warrant is issued by a coroner in a death case, the defendant has the same right to a preliminary hearing.

WHERE WARRANT IS ISSUED BY CORONER. "In instances in which a warrant charging a crime beyond the jurisdiction of a magistrate is issued by a coroner, a preliminary investigation as provided for herein shall be granted, upon demand of the defendant, by the magistrate having territorial jurisdiction."

REMOVAL OF HEARING. "A defendant when first

brought before a magistrate may demand a removal of the hearing to the next magistrate on the same grounds as in cases within the jurisdiction of the magistrate and shall be granted two days, if requested, within which to prepare a showing for such removal during which time he shall be held by recognizance in bailable cases or committed for custody."

PURPOSE OF PRELIMINARY HEARING

The purpose of the preliminary hearing is to determine whether or not the State has sufficient evidence to support a finding that it is probable the defendant is guilty of the offense charged.

It is not the duty of the magistrate to try the case, nor is he authorized or empowered to do so. If this were so, there would be two trials...one in the magistrate's court and one in general sessions or county court. The object of the preliminary hearing is to release the defendant from jail...or from the necessity of maintaining bond...if the State does not

have evidence to establish that the defendant is probably guilty of the offense charged.

The defendant has the right to a preliminary hearing only if he makes request for such hearing in writing at least ten days before the beginning of the next general sessions court. If such request is not made, the right is waived.

When the arrest is made within ten days of the convening of a term of general sessions court, there is no right to a preliminary hearing.

Even though the right to hearing has been waived, or when there is no right to such hearing at all, some Solicitors or county prosecuting attorneys prefer to arrange for preliminary hearings anyway. There is nothing wrong with such procedure. It amounts to nothing more than leaning-over-backward in favor of the defendant.

PROCEDURE

The State is required to present evidence to show that there is probable cause to believe the defendant is guilty of the offense charged. It is not required that the State present all the evidence in its possession, nor is it required that the State prove the defendant's guilt beyond a reasonable doubt at a preliminary hearing.

State witnesses may be cross-examined by the defendant or his attorney.

Although the defendant himself may make an unsworn statement if he elects to do so, the defense is not permitted to present witnesses or other evidence for the defense.

INFORMERS OR UNDERCOVER AGENTS

Sometimes, the defense is entitled to have the identity of an undercover agent or informer revealed for interview and possible testimony...when such agent

or informer could be a material witness in the defense to be advanced at trial. But it is not within the jurisdiction of the magistrate to order such revelation. That is exclusively within the jurisdiction of the circuit court or county court in which the case is to be tried. Motions in this area must be made to the trial court.

The same thing applies to any other evidence in possession of the State to which the defense might be entitled.

COMMENTS BY THE SOUTH CAROLINA

SUPREME COURT ON PRELIMINARY HEARINGS

(State v. White, 243SC 238, 242)

In South Carolina, the Preliminary Hearing serves the purpose of determining whether the State can show probable cause and such hearing can only be requested by one charged with crime, and he is not permitted to plead or even make a sworn statement. If he chooses to make an unsworn statement, he may do so; but it can

in no wise be used against him thereafter. The burden being upon the State to show probable cause, the defendant is not permitted to offer any evidence but may cross examine the State's witnesses fully and such evidence is not permitted to offer any subsequent proceedings. Appellant, therefore, has not been denied due process of law, as a Preliminary Hearing under South Carolina criminal procedure is not a 'critical' stage of the proceedings and may be waived by failure to request same in writing 10 days before Court.

State v. Irby, 166 SC 430, 164 SE 912.

PRELIMINARY HEARING CHECK-LIST

(1) Preliminary hearing must be demanded in writing at least ten days before the beginning of the next term of general sessions court.

(2) The State need produce only sufficient evidence to show that the defendant is probably guilty... not proof beyond a reasonable doubt.

(3) The State may not be required to produce all the evidence in its possession.

(4) Defense testimony or other evidence will not be permitted...although the defendant himself may make an unsworn statement.

(5) A magistrate at a preliminary hearing is not empowered to order the state to produce or name an undercover agent or informer. This motion must be made to the general sessions court or county

court where the case will be tried.

(6) State's witnesses may be cross-examined by the defendant or his attorney.

SPECIAL REPORT

UNITED STATES SUPREME COURT DECISIONS
ON SEARCHES OF TRAFFIC OFFENDERS

On December 11, 1973, the United States Supreme Court handed down two decisions relating to searches of persons placed under arrest for traffic offenses. US v. Robinson, 42 LW 4055, and Gustafson v. Florida, 42 LW 4068.

It is because these decisions have been so widely and materially misconstrued that this explanatory special report was felt to be necessary, so that the police officer would not be misled to his injury.

Many news releases, television and radio reports, editorials, and comments by nationally-viewed television entertainers, gave the impression that the Supreme Court had given important new powers to police officers to make thorough searches of persons stopped for traffic offenses. Such a construction of the decisions is completely false.

The Robinson and Gustafson decisions did not change existing law in the slightest degree. In fact, the decisions did nothing more than reaffirm that the law with reference to this area of search and seizure remains as it has been for hundreds of years.

THE ROBINSON CASE

Robinson, a person known to D.C. police as being under driver license suspension, was stopped by a D.C. traffic officer while driving a car in Washington. He was placed under custodial arrest (arrest with intent to place in jail) and searched thoroughly incident-to-arrest. Heroin was found on Robinson's person in the process of that search. He was then charged with drug law violation in addition to driving under suspension.

The United States Court of Appeals for the District of Columbia ruled that the heroin could not be used in evidence against Robinson because it had been found as a result of an unlawful search. The court reasoned

that a traffic offender could be subjected only to a frisk search for weapons...not a thorough search for evidence...even though he was under custodial arrest. The United States Supreme Court disagreed, holding that a subject under custodial arrest for any offense could be searched thoroughly for weapons and evidence, and that the heroin in the Robinson case was properly admitted in evidence since it was the result of a lawful search.

The Supreme Court pointed out that this had been the law under the English common law before this Country was founded, and that the United States Supreme Court had first recognized it specifically as being the law in the United States in a 1914 decision.* The Court, in effect, said that the D.C. Court of Appeals was in error in ruling that the law with respect to thorough searches of traffic offenders under custodial arrest had been changed, and that, on the contrary, the law remained as it always had been.

*Weeks v. US, 232, US 383.

THE GUSTAFSON CASE

Gustafson was stopped by police officers in Florida and placed under custodial arrest for no driver license in possession. A thorough search of his person incident-to-arrest revealed marijuana.

A Florida State Appeals Court held, as did the District of Columbia Federal Court of Appeals in the Robinson case, that thorough search of a traffic offender was unlawful, and that the marijuana found on Gustafson could not be used in evidence. The United States Supreme Court ruled that the Florida State Court was in error also.

WHAT THE CASES HELD

The rule reaffirmed by the Robinson-Gustafson cases is as follows:

(1) Thorough search of a traffic offender under custodial arrest by police officers is lawful ...for the purpose of discovering weapons, evidence, or anything else that might aid the subject in escaping from custody.

(2) Any evidence found by such a search, whether it be in connection with the offense for which the subject was initially arrested or some other crime, may be used against the subject in court.

(3) This is not new law. It has been the law in the United States and under English common law for hundreds of years.

WHAT THE CASES DID NOT HOLD

The Robinson-Gustafson cases made it clear that the law with respect to traffic cases that did not involve custodial arrest had not changed. For example:

(1) A traffic offender stopped and given a uniform traffic ticket for appearance in court (not placed under custodial arrest), or a motorist stopped for a traffic check (license, registration or inspection) may not be subjected to a search of his person.

(2) Search of the person of a motorist not under custodial arrest is lawful in these circumstances only:

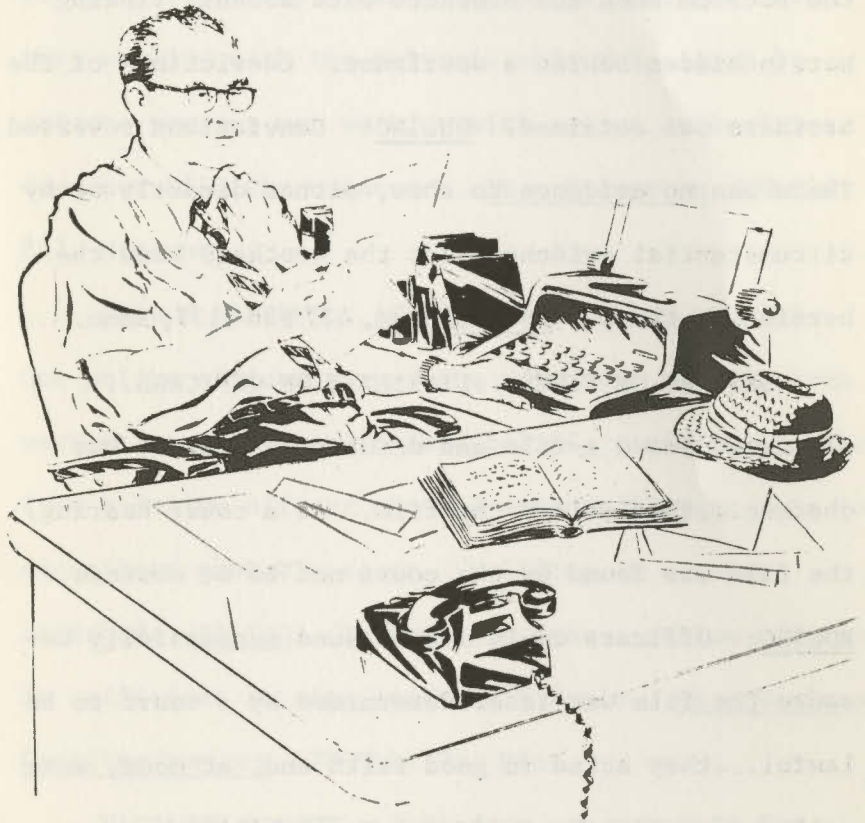
(a) A 'frisk' search for weapons is lawful when the officer has good reason to believe the motorist might be armed and dangerous.

(b) A thorough search for weapons and evidence is lawful when the officer has good reason to believe the motorist might have contraband or stolen goods on his person or in the vehicle he is driving.

(3) Mere suspicion, however strong...without probable cause...does not justify search of the person or

vehicle of a motorist, even though an officer might have the right to stop the motorist for license or registration check.

FLEMING'S NOTEBOOK



FLEMING'S NOTEBOOK...Chapter 96:

The defendants were brothers occupying one bedroom in the family home in which several other members of the family lived...Officers made lawful entry into the bedroom when the brothers were absent, finding heroin hidden behind a doorframe. Convictions of the brothers was obtained. RULING: Convictions reversed. There was no evidence to show, either directly or by circumstantial evidence that the brothers knew the heroin was there. US v. Bonham, 477 F2d 1137, Penn.

SEIZURE OF FILMS...LIABILITY OF OFFICERS... Officers viewed a film and determined that it was obscene...they seized the film. At a court hearing, the film was found by the court not to be obscene... RULING: Officers could not be sued successfully because the film was later determined by a court to be lawful...they acted in good faith and, at most, were guilty of a mistake in fact...No liability... Cambist Films v. Duggan, 475 F2d 887, Penn.

BAGGAGE SEARCH BY AIRPORT EMPLOYEES...Without a warrant and without probable cause, airline employees searched baggage checked on a flight by a passenger who fitted the "profile"...Unlawful drugs were found ...was the evidence admissable? RULING: Search was lawful because employees were not police, nor were they working with the police...unlawful search by private persons not working with police authorities does not kill the evidence...US v. Wilkerson, 478 F2d 813, Missouri.

SEARCH WARRANT...AFFIDAVIT OF FELLOW OFFICER... One police officer signed the affidavit for a search warrant upon information and belief...information was from a fellow officer who had seen sufficient acts to constitute probable cause. Validity of warrant attached...RULING: Information from a fellow officer is sufficient to sign lawful affidavit...US v. Various Gambling Devices, 478 F2d 1194, Miss.

VAGRANCY ARREST...Defendant was arrested for vagrancy and searched...When he was booked, narcotics outfit was found in his car in a valid incident-to-arrest search...RULING: Evidence of 'narc kit' could

not be used against defendant because arrest for 'vagrancy' was illegal...and search incident to unlawful arrest is unlawful. Lawrence v. Henderson, 478 F2d 705.

STOLEN CREDIT CARD...A credit card reported stolen by the credit card company was used to 'purchase' merchandise...police arrested defendant upon telephone description of defendant and information from victim that the credit card was on 'stolen list' supplied by the company that issued it...Stolen card was found on defendant in search 'incident-to-arrest' ...no search warrant involved. RULING: Arrest and Search legal...police could rely upon report of issuing company that credit card was stolen... US v. Wilson, 479 F2d 936, Illinois.

INTERROGATION...Questioning officer, after having given suspect proper MIRANDA warnings, told defendant to "try to help himself"...RULING: This was proper urging and did not make statement by defendant inadmissable...US v. Williams, 479 F2d 1138, W.Virginia.

FORGERY PROSECUTION...FORCED HANDWRITING SAMPLE... Judge ordered forgery defendant to give sample of his handwriting to be used in evidence...Conviction was appealed because of use of sample as evidence... RULING: Court was empowered to order defendant to give sample of his handwriting...No constitutional right of the defendant was violated. US v. Rogers, 475 F2d 821, Wisconsin.

IDENTIFICATION OF DEFENDANT BY VICTIM...The victim of a robbery accompanied police to look for robbers... while cruising with police, victim spotted robber on street and identified him. Defendant claimed this violated his 'line-up' rights. RULING: Victim's identification of the robber was OK...He was the one who pointed out the defendant...the police did not pickup the suspect and bring him to the victim to be identified. US v. Crawford, 478 F2d 670, D.C.

IDENTIFICATION BY PHOTOGRAPH...A rape victim identified the defendant from a photo in the files of the Sex Squad of a police department...RULING: Photo was properly admitted in evidence...'Line-up'

rules do not apply to photographs. US v. Jones, 477 F2d 1213, District of Columbia.

SEARCH OF TRANSIENT HOTEL ROOM...Manager of a hotel for transients reported to police that a bellman had seen a sawed-off shotgun in the room of a patron of the hotel...occupant absent...Police entered without warrant seized the gun...RULING: Emergency situation justified search without warrant...Gun was unlawful and a danger to the community...it could have been hidden before a warrant could have been issued. US v. McKinney, 477 F2d 1184, District of Columbia.

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