

December 2019

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Recommended Citation

Leonard J. Georges, *What Constitutes a Search*, 7 Wyo. L.J. 150 (1953)
Available at: <https://scholarship.law.uwyo.edu/wlj/vol7/iss3/8>

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WHAT CONSTITUTES A SEARCH?

The police received an anonymous telephone call informing them that two unidentified cars met periodically at night at a particular place under circumstances arousing suspicion. Two officers patrolled the area on the night following receipt of this "tip," and observed the cars. Before the occupants could be questioned, the cars pulled away. The officers pursued but lost them in traffic. Shortly thereafter, one of the officers stopped a car driven by defendant, thinking it might be one of the cars he was after. The officer examined the defendant's driver's license and flashed his light into the interior of the car. According to the officer's own testimony, while inquiring about a package lying on the rear seat, "he sort of lifted it up," and looked under it. Thereupon a passenger voluntarily stepped from the car and attempted to push two packages beneath it with her foot. In these packages were unlawful lottery tickets and money, which the officers seized. These were offered in evidence at the trial for unlawful possession of lottery tickets, which followed. *Held*, that the fact that the officer, after halting the car, inquired as to what was in the package on the backseat, and flashed his light in the car, "might not be said to have amounted to a search," however, when he reached into the car, picked up the package and looked under it, he was without doubt making a search. Under the circumstances the search and subsequent seizure were unlawful, and under the so-called federal rule (followed in Florida) the contraband seized was not admissible in evidence. *Kraemer et al. v. State*, 60 So.2d 615 (Fla. 1952).

It is not the purpose of this article to go into the doctrine of unlawful or unreasonable searches and seizures. Thus, there will be no attempt to discuss the constitutional aspects of searches and seizures, nor the admissibility in evidence of articles obtained as a result of unlawful searches and seizures.

A search has been defined as "an examination of a man's home, premises, or person for the purpose of discovering proof of his guilt in relation to some crime or misdemeanor of which he is accused."¹ Several cases have indicated that this "examination" must involve something more than mere observation of an article in obvious view, in order to constitute a search.

For example, in a Missouri case² a store manager and a policeman seeking to recover stolen merchandise came upon defendant's parked car and upon looking into the car saw the alleged stolen merchandise. The court held that these facts were insufficient to constitute a search, saying that a search means of necessity, a quest for, or a seeking out of, that which offends the law. It implies a "prying into hidden places for that which

1. Bouvier's L. Dict., 3rd Ed.

2. *State v. Hawkins*, 362 Mo. 146, 240 S.W.2d 688 (1951);

is concealed." It is not a search to observe that which is open and patent, in either sunlight or artificial light.

In a federal case,³ a defendant drove up in an automobile near some officers and alighted. One of the officers walked around the back of the car to the opposite side, and noticed that the rear door was open. He turned his flashlight on the floor of the car and saw some contraband. These circumstances were held insufficient to constitute a search, which, said the court, means some exploratory investigation.

In *Boyd v. United States*,⁴ the defendant was standing a short distance from his parked automobile on the side of the road. A prohibition officer "looked into the car" and saw two gallons of whiskey in fruit jars on the back seat. The Circuit Court of Appeals of the Fourth Circuit held that it is not a search in any legal or colloquial sense for an officer to look into an automobile standing on the roadside.

While waiting for the passage of a freight train across the highway, two policeman in South Carolina disembarked from their car to look into the defendant's car, where they saw unconcealed liquor. A search, said this court, implies invasion and quest, some sort of force, actual or constructive, much or little.⁵

In *People v. Exum*,⁶ officers took articles from the front and rear seat of the defendant's car. He disclaimed all interest in or knowledge of the articles, but contended his automobile had been searched. The court held that a search implies a "prying into hidden places for that which is concealed," and it is not a search to observe that which is open to view; hence, no search had been made.

While looking through a transom into the rented room of the defendant, in the District of Columbia, the police observed the commission of a misdemeanor. In holding that there had not been a search, the court pointed out that although it has been said that, ordinarily, searching is a function of the sight, it is generally held that a mere looking at that which is open to view is not a search.⁷

A Wyoming district court cause involving the problem of what constitutes a search was recently decided by Judge Glenn Parker of the Second Judicial District.⁸ The defendant ran a bar which had an adjoining room where slot machines were being operated. An officer, apparently looking for the slot machines, walked into this adjoining room. The evidence was uncontradicted that the machines were being operated at the time the officers first saw them. The officer had some discussion with the bartender and

3. *Smith v. United States*, 2 F.2d 715 (4th Cir. 1924).

4. *Boyd v. United States*, 286 F. 930 (4th Cir. 1923).

5. *State v. Quinn*, 111 S.C. 174, 97 S.E. 62, 3 A.L.R. 1500 (1918).

6. *People v. Exum*, 382 Ill. 204, 47 N.E.2d 56 (1943).

7. *McDonald v. United States*, 166 F.2d 957, reversed on other grounds, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

8. *State v. Homer Thompson and Fred Rumph*, Docket No. 2343 (1953).

told him he was going to seize the machines. He then called the sheriff's office for a truck which hauled them away. There was no affidavit filed or search warrant issued. Defendant moved to suppress the evidence because of illegal search. In deciding the case it was first necessary for the court to determine whether there had been a search. In holding that there had been no search, Judge Parker wrote:

"The evidence is clear that the rooms from which the machines were taken formed a part of or at least were used in connection with the bar. This room was open to the public and was used by anyone who chose to enter the establishment which catered to everyone. The machines were in plain view and were each imprinted with words and symbols to indicate that they were gambling devices.

"The principle seems well established that: Where no search is required, the constitutional guarantee is not applicable. The guarantee applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a search without a warrant where there is no need of a search and where the contraband subject matter is fully disclosed and open to the eye and hand."⁹

In the light of the preceding authorities, *Kraemer et al. v. State* appears to be a borderline case. Had the packages of lottery tickets and money been discovered as a result of the rummaging by the officer, and the "sort of lifting up" which he did, it would have been correct to hold that a search was made. These actions of the officer constituted something more than the observation of articles which were open and patent; he was "prying into hidden places for that which was concealed." Since, however, the contraband was not discovered until the passenger *voluntarily* stepped out of the car and attempted to push the packages underneath, and, when discovered, the packages were in view on the public highway, it is submitted that the dissenting judge was probably correct in concluding that the contraband was not obtained as the result of a search.

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9. At this point the judge cited the following authorities: 47 Am. Jur. "Searches and Seizures," paragraph 20, note 17, page 516, citing 3 A.L.R. 1453. To a similar effect is 56 C.J.: "Searches and Seizures," paragraph 82, note 72, which cites *U.S. v. Robstein*, 14 F.2d 227, which case cites in re: *Lobosco*, 11 F.2d 892. The judge added, "The part of the premises commercially used as a store may be entered without a search warrant. There is no search made where articles are in plain view of officers who may, as any other member of the public, enter a place open to anyone." Note 130 U.S.C.A. Constitution, Amend. 4.