Criminal Law: Case Notes

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On July 19, 1967, the body of Paul Radcliffe was found along the banks of the Olentangy River in Delaware County, Ohio. Radcliffe had been killed by a shotgun blast, and his car had been pushed into the river. Police investigators made casts of tire marks found at the scene and obtained foreign paint fragments from the rear bumper of Radcliffe's car. During the investigation which followed it was discovered that in May of that year Radcliffe had been employed as an accountant to inspect the books of a firm owned by Arthur Ben Lewis. On July 24, 1967, the officer in charge of the investigation, Lavery, talked with Lewis. On September 28, after a second interview, the investigation focused on Lewis as a prime suspect. On October 9, Lewis was called to police headquarters for further questioning. On October 10, Lavery obtained an arrest warrant. Although Lavery believed that Lewis' car had been used in the crime and intended to seize the car, he did not obtain a warrant for its seizure.

Lavery went to the offices where Lewis was being questioned, but did not execute an arrest warrant until seven hours later, after the arrival of Lewis' counsel. Lewis had given his car keys and a parking lot claim check to his attorney so that his wife might use the automobile. Confronted by investigators, the attorney turned over the keys and claim check to the police who claimed authority to seize the car "as evidence." The car was towed to a police lot. The next day a police technician, proceeding without a warrant, searched the trunk, compared the right rear tire with cast impressions made at the scene, and removed paint scrapings from the car. At trial the technician testified that the paint samples so obtained were similar in color, texture, and order of layering to the samples taken from the bumper of the victim's car.

Lewis was convicted and his conviction was affirmed by the Ohio supreme court. In federal habeas corpus proceedings the United States District Court for the Southern District of Ohio held that the warrantless seizure and the warrantless search violated Lewis' fourth

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1 At this point in the investigation Lavery not only had probable cause to arrest Lewis, but also had a laboratory analysis indicating that the paint traces found on the victim's car came from a 1965 or 1966 General Motors automobile. Lavery knew that Lewis owned a beige 1966 Pontiac. Lewis v. Cardwell, 354 F. Supp. 26 (S.D. Ohio 1972).

CASE NOTES

On review the United States Supreme Court reversed without a majority opinion. Mr. Justice Blackmun was joined by three members of the Court in his view that the removal of paint from the exterior of the car did not invade any right protected by the fourth amendment. The activity of the technician did not constitute a search, and even if it did, it was reasonable under the circumstances. Moreover, Blackmun asserted that the police are justified in conducting a warrantless seizure of an automobile where the owner is alerted to police intentions and therefore motivated to destroy or remove evidence. Furthermore, since the seizure facilitated the technical examination it was more readily seen as necessary under the circumstances and not objectionable. Mr. Justice Powell did not address the merits but, concurring in the reversal, expressed the view that a federal collateral review of a state prisoner's fourth amendment claims should be confined to the question whether he has been provided a fair opportunity to vindicate his claims in the state courts. Mr. Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, dissented from the reversal because of the absence of exigent circumstances excusing the failure of the police to obtain a warrant to seize the automobile.

This case note will focus on the Court's justification for the warrantless seizure of Lewis' automobile and the nature of the issues involved in the subsequent search. The discussion will also deal with a burden of proof issue raised by the Blackmun opinion. Finally, the future of Cardwell v. Lewis will be considered.

There are two reasons for focusing on the warrantless seizure in Cardwell v. Lewis: first, if the warrantless seizure were unjustified, then the testimony of the technician, the product of the search, was not properly admitted into evidence, and second, the propriety of the seizure is the issue on which the opinions diverge. The guiding principles to be used in examining the opinions of Justices Blackmun and Stewart will be the developed fourth amendment doctrine.

The fourth amendment guarantees the right of the people to be secure against unreasonable searches and seizures. The amendment can be broken down into several parts showing the respective interests

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6 U.S. CONST. amend. IV, provides: "The right of the people to be secure in their persons, Houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."
protected. The amendment prohibits unreasonable seizures of persons and things, and unreasonable searches of persons, places, and things. The purpose of the amendment is to restrict to a minimum the incursions on personal liberty inherent in seizures and searches conducted by officers of the state.

The amendment does not absolutely prohibit searches and seizures, but permits them where the police follow a procedure designed to minimize unjustified incursions. This procedure is provided in the second clause, which specifies that warrants permitting search and seizure are to be obtained only on probable cause. Both the history of the amendment and the decisions of the United States Supreme Court place heavy reliance on the "warrants clause" as a means of preventing unjustified searches and seizures. The warrants procedure theoretically insures that the decision that a citizen's rights shall yield to the needs of the state will be made by a neutral judicial officer. Unless there are special circumstances which make it impractical to obtain a warrant, a search or a seizure may only be made pursuant to a warrant. Except in carefully defined classes of cases searches or seizures without consent and without a warrant are per se unreasonable.

*Cardwell v. Lewis* involved a seizure and subsequent search of the suspect's automobile. Both the seizure and the search were incursions on important interests protected by the fourth amendment. The seizure deprived Lewis of control of his property. The link between a private citizen and his property is an important privacy expectation in American society. Moreover, the subsequent seizure of paint fragments from his car was a trespass, an invasion of property rights. In addition, the search of Lewis' automobile constituted a separate intrusion into his privacy. To the extent that an automobile can be considered a private area, it is protected by the fourth amendment. Lewis' interests were protected from the warrantless search and seizure conducted unless an exception to the general rule requiring warrants is applicable on the facts of the case.

One exception to the general rule requiring warrants for seizure

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13 This latter interest may or may not have been invaded in *Lewis*, but will be considered in the discussion of warrantless searches, *infra.*
of automobiles was stated in *Carroll v. United States.* There it was held that where the police have probable cause to believe that a moving vehicle contains evidence of a crime, they may stop the car without a warrant (a warrantless seizure) and search the car because the strict requirement of a warrant might permit the evidence to escape from the jurisdiction. Warrantless detention of moving vehicles is justified where "it is not practical to secure a warrant because the vehicle can be quickly moved out of the jurisdiction in which the warrant must be sought." Any doubts about the scope of the moving vehicle exception were resolved by *Coolidge v. New Hampshire.* In that case the Court refused to apply the *Carroll* exception holding that where the car is not moving when the police confront the occupant, there must be some real possibility of removal of the automobile with a consequent loss of the evidence sought, rendering the normal warrants procedure impractical. Thus where all the occupants of a vehicle are under police control and the car is in police custody, the moving vehicle cases are not apposite, because there is no exigency comparable to that in *Carroll* to justify a warrantless seizure. It has been held that a comparable exigency exists where the police have a reasonable fear that confederates might gain access to the car and remove it. The existence of such an exigency is a question of fact on which the state should bear the burden of proof. The fact that an automobile is the subject of the warrantless seizure or search does not of itself evoke an exception to the warrants procedure.

Furthermore, the "automobile exception" of *Carroll* is founded on the possible frustration of effective law enforcement by a requirement that the police go through the warrants procedure. Thus any exigency which the police assert as a justification for warrantless seizure must be based on some substantial law enforcement interest sufficient to overcome the fourth amendment interests of the private citizen, and not mere police convenience.

Applying these major precedents to the facts in *Cardwell v.*

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15 The Court did not consider a situation in which the police have prior knowledge that an automobile will be traveling a certain route at a certain time and thus have time to obtain a warrant. Arguably *Carroll* would not apply to such a case.
16 *Id.* at 150.
17 403 U.S. 443 (1971).
20 *The Supreme Court, 1966 Term,* 81 HARV.L.REV. 69, 118 (1967).
Lewis should have led the Court to affirm the district court’s determination that the warrantless search and seizure were violative of Lewis’s fourth amendment rights. There was little reason to believe that Lewis would have destroyed or concealed the evidence. This was not a case of an “alerted criminal bent on flight” or a “fleeting opportunity on an open highway.” Lewis had known for some time prior to his appearance at the final October 10 interview that he was a prime suspect. The automobile was parked in a nearby lot at the time of arrest. The police knew the location of the car, and had the keys and parking lot claim check. Furthermore, the police had made no effort to seize the car in the months prior to the arrest, even though the police officer in charge had probable cause to believe that it was used in the crime and that paint scrapings might provide valuable evidence. Under the circumstances it was unlikely that the seizure was motivated by any substantial fear of loss of evidence. Moreover there was no reason to believe that any co-conspirators might try to remove the car from the jurisdiction. Furthermore the police had the keys and claim check. If the activity of co-conspirators were feared, the police might have placed the car under surveillance in order to discover and apprehend them. Since the police had time to obtain a warrant and chose the time and place of confrontation, there was little basis for a finding of exigency.

The application of the moving vehicle rationale to a stationary vehicle, the keys to which are in police control, would be a strained extension of prior case law. The fact that the intrusion might be deemed minor or unimportant is not relevant. An argument that a seizure is itself reasonable without regard to the practicability of obtaining a warrant would be quickly rejected under existing doctrine as “founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests.”

The Blackmun opinion in Lewis began with an examination of the search. However, analysis here will begin with part III of the opinion which deals with the seizure. Blackmun began by distinguishing Coolidge from Lewis on the basis that Coolidge involved an entry on private property. He stated that the facts of the case before the Court were controlled by Chambers v. Maroney, because in Lewis,

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as in Chambers, the "automobile was seized from a public place where access was not meaningfully restricted."27

In Chambers the police had probable cause to arrest four men and stop and search their moving vehicle after a late night armed robbery. The car was removed from the highway and towed to the station house. Blackmun stated that the fact that the car in Chambers was seized from a public highway while the car in Lewis was seized from a parking lot was of little significance, because the "same arguments and considerations of exigency, immobilization, and posting a guard" as were present in Chambers were also present in Lewis. Apparently Blackmun's reference to the accessibility of the Lewis automobile related to a real or imagined threat of activity of co-conspirators. Blackmun stated that when Lewis was arrested he was alerted to the possibility that the police might seize his car, and from this "the incentive and potential for the car's removal increased."28 Blackmun added that the seizure made the technical examination involved in the paint and tire comparisons easier.29 Under these circumstances Blackmun found that the warrantless seizure was "not unreasonable."

In contrast to the approach in the Blackmun opinion, Justice Stewart's dissent focused on the seizure. He pointed out that the moving vehicle exception did not apply to the facts of the case because there was no reasonable likelihood that Lewis' automobile would be moved. Once the keys and claim check were in police control there was no real danger of removal by third persons. Furthermore, Stewart suggested that there was no reasonable basis for finding that the police did not have time to obtain a warrant. He challenged the Blackmun opinion as finding exigency where none existed on the facts. There being no justification for the seizure of the car, Stewart pointed out that discussion of the search was simply irrelevant.30

The Stewart opinion rather than the Blackmun opinion is consistent with the analysis under the existing case law suggested supra. Blackmun's reference to Chambers was unjustified. Chambers dealt with the seizure of a moving vehicle and only with a great deal of straining can it be used to justify the seizure in Lewis. Blackmun cited Chambers for the proposition that where there is probable cause to search, there is no constitutional difference between "seizing and

28 Id. at 595.
29 Id.
30 Id. at 597.
holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.\textsuperscript{31} When Chambers is examined, it can be seen that the Court assumed that the initial seizure was proper. The Chambers Court was concerned with the propriety of search subsequent to seizure, and after engaging in a less restrictive alternative analysis, decided that where a car was properly seized, the further intrusion of search was of little additional significance. Justice Blackmun, having already concluded that the search in Lewis was not violative of the fourth amendment, attempted to use the language in Chambers to justify the initial seizure. This upside-down approach is particularly troublesome in that it may be an attempt to develop a rationale for warrantless seizure of automobiles where the police have probable cause to search them and no more.\textsuperscript{32} Furthermore, Justice Blackmun's reference to the fact that seizure made the technical comparisons easier is little more than a convenience argument. This convenience is not the sort of substantial police need which should override Lewis' fourth amendment arguments.

The Blackmun opinion has done little more than equate exigency with the word automobile. An exigency comparable to that in Carroll is found despite the dissimilarity of the facts. In effect the "automobile exception" is applied in a manner which simply erases the general rule requiring warrants.

Mr. Justice Stewart's primary concern in Lewis was the lack of evidence offered to support the contention that exigency could be found to justify warrantless seizure.\textsuperscript{33} The Blackmun opinion fits into a pattern of recent decisions in which the Court has shown an inclination to draw all inferences in favor of the prosecution on the issues of exigency and risk of destruction of evidence.\textsuperscript{34}

The prosecution should bear the burden of proving that an exception to the warrants requirement is applicable to the facts of the case. Vale v. Louisiana,\textsuperscript{35} a case involving a warrantless search of premises, strikingly illustrates the degree to which the Court had, in the past, been unwilling to accept the existence of exigency merely upon the police assertion of it as a justification for not obtaining a

\textsuperscript{31} The language of Chambers has been subject to numerous interpretations. Its status as law is doubtful. See C. McCormick, Evidence § 171 at 385 (2d ed. 1972).

\textsuperscript{32} In part II of his opinion Justice Blackmun upholds the warrantless search because it was based on probable cause and did not violate any interest protected by the fourth amendment. Cardwell v. Lewis, 417 U.S. 583, 592 (1974).

\textsuperscript{33} 417 U.S. 583, 598 (1974).

\textsuperscript{34} Cady v. Dombrowski, 413 U.S. 433 (1973); Cupp v. Murphy, 412 U.S. 291 (1973).

\textsuperscript{35} 399 U.S. 30 (1970).
warrant. In Vale the police obtained an arrest warrant for the suspect on another matter, but when they arrived at his house they saw what reasonably appeared to be a narcotics sale taking place in front of the suspect's house. The police arrested the suspect and made a quick inspection of the house to see if anyone were present who might abscond with evidence. The police then made a full search and found narcotics. The Court held that the state had not met its burden of proving exigency so as to justify an exception to the warrants requirement. Here, unlike Lewis, the police probably did not have probable cause to believe that the defendant was dealing in narcotics or that incriminating evidence might be found in his home until it was too late to obtain a warrant.

An explanation of the result is that the state did not establish whether or not the officers had probable cause for the search prior to their arrival at the suspect's premises. If the police had "search-type" probable cause prior to their arrival, they should have obtained a warrant. The fact that they had an arrest warrant indicated that they had time to do so. Had the prosecutor established clearly that probable cause for the search did not exist prior to their arrival the result presumably might have been different. Moreover, the proposition that the prosecution must bear the burden of proof of exigency is implicit in the facts of Carroll and Chambers, where the initial seizures were made of moving vehicles.

In Lewis the reported evidence indicates that the investigators had probable cause to seize Lewis' automobile weeks prior to the arrest. An arrest warrant was obtained. There was no evidence indicating a threat of destruction or removal of the evidence. The Blackmun opinion assumed exigency merely because the item seized and subsequently searched was an automobile. As a result the automobile exception is expanded to authorize warrantless seizure on probable cause with only an fiction of exigency and without requiring the prosecution to meet its burden of proof.

Because the warrantless seizure was unjustified in Lewis, the constitutionality of the search should not be determinative of the result. However, the Blackmun opinion raises several troublesome issues with regard to the warrantless search of automobiles meriting comment. Even if the initial seizure were permissible and the police had lawful custody of the car, Lewis would retain some property rights in the automobile. Moreover, the automobile would not lose its character as a private area. Thus a warrantless search justified solely on a lawful seizure would ignore many of Lewis' constitutionally protected rights.

The Blackmun opinion focuses on whether removal of paint
from the exterior of the car "invades a right of privacy which the interposition of a warrants requirement is meant to protect." In answering this question Blackmun separated property rights from privacy rights. Since Mr. Justice Blackmun interprets the fourth amendment to protect only privacy rights, the removal of paint from the exterior of the car was in his view reasonable because the paint was exposed to public view and not subject to fourth amendment protection. An automobile has "little capacity for escaping public scrutiny." Blackmun asserted that where probable cause existed and the paint was removed from the exterior of the car, a warrant was not required.

The Court has often suggested that the search of an automobile differs from the search of premises. However, except for referring to exigent circumstances making it impractical to obtain a warrant, such as the mobility of the vehicle in Carroll, the Court has not provided any compelling rationale to support a less stringent application of the warrants rule to automobiles. The only rationale found in the literature is the very one which Justice Blackmun offers, that is, that a person has a reasonable expectation of greater privacy with regard to premises than with regard to an automobile:

The greater part of the interior of the car is constantly within the public view. Autos are consistently left with casual bailees who have complete control over the car for extended periods of time. Therefore the privacy interest in the automobile may be sufficiently inferior to that of a home to justify permitting a less stringent procedure for search.

The weakness in such an argument stems from its reliance on plain view and casual observation. Where mobility is gone, there seems to be little reason to treat automobiles differently from homes. It is because of mobility or some comparable exigency that a car may be searched without a warrant on facts that would not support a warrantless search of premises.

Justice Blackmun's analysis divides Lewis' rights into two neat bundles, privacy rights and property rights. In Blackmun's view only privacy rights are protected by the fourth amendment. The opinion

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27 Id. at 590.
30 See Annots., 26 L.Ed.2d 893 (1971); 29 L.Ed.2d 1067 (1972); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).
appears to draw on the authority of *Katz v. United States*, in which it was held that a warrantless eavesdropping on a public telephone booth constituted an unreasonable search and seizure because the defendant using the booth had a reasonable expectation of privacy. To circumvent the fact that the booth was public property, the Court departed from older precedents requiring a trespass on private property before an intrusion could constitute a search, and commented that the fourth amendment protects people and not property. This is not to say that property rights are not protected by the fourth amendment where they are based on socially accepted expectations of security. Mr. Justice Stewart, who wrote the opinion in *Katz*, was careful to point out that the word "secure" as it is used in the fourth amendment, is not co-extensive with privacy rights. In his view the fourth amendment protects property rights also. While the existence of a trespass is not a prerequisite to finding a search in the fourth amendment sense, this is not to say that a trespass on private property is not important where it is present in the facts of a case. In *Lewis* the police scraped paint from Lewis' car. There is a socially accepted basis for Lewis' expectations of security of his property from such conduct. In short, Justice Blackmun's reliance on *Katz* proves too much.

If the initial seizure of an automobile is lawful it is difficult to justify a warrantless search. Perhaps this explains why Justice Blackmun began with the search issue rather than the seizure issue. To the extent that an automobile is a private area, a warrantless search cannot be justified by exigency, because with police custody the exigency vanishes. Insofar as the police are provided with time to obtain a warrant, the protection afforded by prior judicial scrutiny is sacrificed for no compelling reason.

Mr. Justice Powell concurred in the result in *Lewis* but made no mention of the merits. Consequently the *Lewis* case is a "no rationale" decision. Whether or not *Lewis* will have a lasting impact on the law of search and seizure remains to be seen. The final issue to be discussed, then, is how Mr. Justice Powell might have cast his vote

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42 Id. at 350.
43 417 U.S. 583, 596 (1974). Justice Powell's opinion in *Lewis* expressed a theory for reversal which carefully avoided the merits of the case. Powell first expressed his notion that federal collateral review of a state prisoner's fourth amendment claims should be limited to questions whether he was provided a fair opportunity to litigate them in state court in his concurring opinion in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In that case Powell explicitly joined in the opinion of the majority, while confining his own discussion to the nature of federal collateral review of fourth amendment claims. Perhaps his refusal to concur in the merits of the Blackmun opinion is of some significance.
had the case arisen on direct rather than collateral review.

Mr. Justice Powell has in the past expressed a view that the warrants requirement reflects the important policy determination that those charged with investigative and prosecutorial duties should not be the sole judges of the reasonableness of their actions. In a recent case involving a border search of automobiles, Justice Powell refused to extend the Carroll rationale for warrantless search and seizure. Though that particular case turned on the absence of probable cause, Powell's concurring opinion demonstrates that he is unwilling to treat automobiles as a special class of things to be seized and searched, which might permit less stringent fourth amendment protection. Powell's belief in the warrants procedure, and his recognition that the Carroll line of cases rests on the impracticality of obtaining a warrant for search and seizure of moving vehicles, suggest that he would vote with Justice Stewart. This conclusion is supported by the absence of facts in the Lewis record that might prove exigency.

The Lewis case is a result without a rationale and will probably lose its vitality when a similar case arises on direct review. However, it does confuse the automobile search and seizure issue. It indicates that at least four justices would expand the automobile exception to the general rule requiring warrants to the point where the exception engulfs the rule. Were the Blackmun opinion a majority opinion, the resulting rule would be that where a vehicle is on public property the police need not have a warrant to seize it. Automobiles would provide exigency whatever the facts of the case. The Blackmun opinion also indicates that the Court is becoming more willing to draw all inferences in favor of the prosecution on the issue of justification for warrantless action, a finding perhaps more far-reaching than the first.

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46 Id. at 281.