SEARCH, SEIZURE, AND OBSCENITY—CONFUSION IN THE TEST FOR PROBABLE CAUSE

United States v. Peisner
311 F.2d 94 (4th Cir. 1962)

Defendants were convicted in the United States district court for transporting obscene books in interstate commerce for the purpose of sale or distribution.[1] The court of appeals reversed, holding that no probable cause existed for the crucial search of defendants' automobile by the New Jersey state policeman, and that the books found thereby were improperly admitted.[2] The court's opinion reprehends such searches for obscene material except where a qualified individual, aware of the *Roth* test for obscenity,[3] makes a prior determination that the publications to be seized are obscene. The decision rests upon an interpretation of the "reasonable and warrant

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[1] The lower court's opinion was not reported. In United States v. Peisner, 198 F. Supp. 67 (D. Md. 1961) the lower court overruled defendants' pretrial motion to suppress the evidence. Defendants were convicted of a violation of 18 U.S.C. § 1465 (1955) which provides in pertinent part:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, phamphlet . . . or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
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> When any person is convicted of a violation of this Act, the court in its judgment, of conviction, may, in addition to the penalty prescribed, order the confiscation and disposal of such items described therein which were found in the possession or under the immediate control of such person at the time of his arrest.

The FBI had been watching defendant Peisner for over a year and had twice before definitely connected him with the printing and sale of obscene materials. On this occasion, the FBI possessed information from a supposedly reliable informant and had corroborated this information by observing Peisner and the other defendant loading packages in Peisner's car with the help of one David Lerner who had previously been connected with Peisner in the printing and distribution of obscene material, Peisner's traveling in the direction indicated by the informer, Peisner's stopping at a bookstore known to have handled obscene literature, and his elusive driving.

[2] United States v. Peisner, 311 F.2d 94 (4th Cir. 1962). The court failed to distinguish a 1958 finding of the same court as to the probable cause requirements. Ray v. United States, 255 F.2d 473 (4th Cir. 1958):

> There is no doubt that a search warrant is not a prerequisite to a legal search of an automobile operated upon highways. Our inquiry goes only to the existence of a reasonable basis, founded upon the knowledge and observation of the acting officers, and their belief that the vehicle probably was being used to transport contraband.

[3] The test is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957). Query whether the court of appeals wished to add the "patently offensive" requirement of Manual Enterprise Inc. v. Day, 370 U.S. 478 (1962) to the basic *Roth* test.

clauses" of the Constitution[4] and the effect that the "freedom of speech clause"[5] may have upon them.

The specific problem before the court was whether probable cause existed for the search and seizure, as required by the fourth amendment.[6] Since the cases of *Boyd v. United States*[7] and *Weeks v. United States*[8] the fourth amendment has been interpreted to prohibit the admission of evidence obtained by unreasonable searches and seizures, which includes those conducted without probable cause.[9] Although the fourth amendment requirement of a warrant to search and seize[10] a person or his effects has been dispensed with where moving vehicles are involved, the probable cause requirement otherwise is the same.[11] The test followed in the four leading automobile

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[4] U.S. Const. amend. IV:

> 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 Warrant shall issue, but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Emphasis added.)

See also United States v. Rabinowitz, 339 U.S. 56 (1950). The majority of the Court adopted the reasonableness clause as controlling and de-emphasized the requirement of a search warrant. Justice Frankfurter vigorously dissented urging that the warrant clause rules with the only exceptions being those of necessity: (1) searching a moving vehicle without a warrant because it may easily be moved out of the jurisdiction before a search warrant may be obtained; and (2) searching the person as incident to an arrest to protect the officer and prevent the arrestee's possible escape.

[5] U.S. Const. amend. I: "Congress shall make no law . . . abridging the freedom of speech. . . ." For a discussion of the developing constitutional standards in the area of obscenity see Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards," 45 Minn. L. Rev. 5 (1960).

[6] Jones v. United States, 362 U.S. 257 (1960) is the most recent case where the Supreme Court after a thorough review of the facts found probable cause to exist for the issuance of a search warrant. The officer here relied solely upon the information of a supposedly reliable informant who described the defendant, told where he would be at a certain time, and that he would have narcotics in his possession. The Court accentuated that purely hearsay testimony could constitute probable cause as long as there was reasonable corroboration of the individual's appearance and where he would be at the time stated. In Wong Sun v. United States, 83 Sup. Ct. 407 (1963) the Supreme Court seems to have stepped back toward a more strict standard for probable cause.

[7] 116 U.S. 616 (1886).

[8] 232 U.S. 383 (1914). See also Mapp v. Ohio, 367 U.S. 643 (1961) which applies the fourth amendment exclusionary rule to the states through the fourteenth amendment.

[9] Jones v. United States, *supra* note 6. In the area of probable cause for arrest, and search and seizure incident thereto, see Draper v. United States, 358 U.S. 307 (1958), overruling the "competent trial evidence" requirement of Grau v. United States, 287 U.S. 124, 128 (1932).

[10] See Broeder, "Wong Sun v. United States, A Study in Faith and Hope," 42 Neb. L. Rev. 483, 492-501 (1963) for a recent discussion of the probable cause requirement and the fourth amendment.

[11] Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S.

search and seizure cases[12] was a reasonable, but non-technical belief arising out of the circumstances known to the arresting officer that the vehicle contained contraband.[13]

While the Federal Bureau of Investigation might have possessed facts in the *Peisner* case which constituted probable cause for arresting the defendants and searching their car,[14] the search and seizure were made instead by a state turnpike policeman acting merely upon a request submitted by the FBI that he be on the alert for a 1954 Buick which was probably carrying obscene books. He had received no request to stop or search the vehicle. Had the officer been acting pursuant to a FBI request to stop and search the vehicle, under *Gambino v. United States*,[15] he might have been treated as acting in a federal capacity and the knowledge possessed by the FBI could then be attributed to him in determining whether probable cause existed. The state turnpike policeman did not, however, have sufficient knowledge to constitute probable cause.[16]

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160 (1949); Carroll v. United States, 267 U.S. 132 (1925); Ray v. United States, *supra* note 2.

12 See cases cited *supra* note 11.

13 Carroll v. United States, *supra* note 11, at 149:

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction the search and seizure are valid.

In *Carroll* probable cause was found to exist for the search and seizure of illegally transported liquor by three federal prohibition agents and one state officer on the following sequence of facts: (1) About three months prior to the search two of the agents were called upon by the two defendants and another man, who being unaware that the two were agents agreed to sell them some liquor. Both agents saw the car defendants used and got its license number. No liquor was delivered. (2) About a week later the same two agents were patrolling a road known to be used by the prohibition violators when they were passed by the two defendants in the same car. The agents followed the defendants but lost them. (3) On the day in question the officers were again patrolling the highway looking for prohibition violators; met and passed defendants, pursued them, and stopped and searched their car. The Court also judicially noticed the fact that the road led to Detroit which was one of the most active centers for bringing illegal liquor into the country. Brinegar v. United States, *supra* note 11, involves very similar facts. In Henry v. United States, *supra* note 11, probable cause was found not to exist where federal officers stopped a car and searched and seized stolen radios while investigating a theft of an interstate shipment of liquor and believed defendants to be handling the same on the following facts: (1) defendant's employer's statement that defendant had been involved in interstate shipments; and (2) observation of defendants on two different occasions loading cartons into a car from a house in a residential district.

14 United States v. Peisner, *supra* note 1. The court of appeals did not believe that the FBI had probable cause on the basis of the information before it. United States v. Peisner, *supra* note 2, at 104-05.

15 275 U.S. 310 (1927). Here a state officer was specifically applying a federal law and the Court held that he should be treated as if he were a federal officer.

16 The government improperly used Elkins v. United States, 364 U.S. 246 (1960) as authority for passing the knowledge possessed by the FBI to the state officer. In *Elkins*

The court of appeals, however, did not decide the case on the foregoing analysis, but went on to cite *Marcus v. Search Warrant*,[17] linking the first amendment freedom of speech and press protection[18] with the fourth amendment protection from unreasonable searches and seizures. The doctrine of the *Marcus* opinion was that where adequate safeguards are not present to protect non-obscene material, a seizure of obscene material may be an unlawful restraint of freedom of speech and press. In the *Marcus* case, a city police officer obtained a search warrant from a state trial court upon a sworn statement that a wholesale distributor of books, magazines and newspapers, and five retail newsstand operators kept obscene publications for sale. The policeman's complaint was based upon his finding one obscene publication at each of the establishments, but the publications were not included or listed in the complaint. The search warrant permitted *any* police officer to search and seize *all* obscene material found in these places. Different police officers searched the six places and seized some 11,000 copies of 280 publications after a hasty examination. Defendants' motion to quash the evidence at a hearing two weeks later was denied. Two months later the trial court found only one hundred of the seized publications to be obscene and ordered the rest returned. The United States Supreme Court reversed holding that the Missouri procedures *as applied* lacked the safeguards required by fourteenth amendment due process to assure non-obscene material the protection to which it is entitled.[19] The court of appeals in the *Peisner* case, failing to recognize the factual differences between its case and the *Marcus* case, made a significant extension of the first amendment in its application to search and seizure cases.

In *Peisner*, all available evidence connected Peisner with the printing and distributing *only* of obscene materials. The furtive character of Peisner's activity greatly decreased the likelihood that non-obscene materials would be seized. His activities contrast sharply with the overt, lawful business of

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the Court stated that evidence obtained by state officers during a search which would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment if federal officers had conducted the search, would be inadmissible in federal court. It does not follow that *Elkins* is authority for imputing the knowledge of the federal officers to the state officer who stopped the car in order to furnish him with probable cause for his action. See Brief for Appellee. pp. 10-18, United States v. Peisner, *supra* note 2.

In addition, the fact that the state officer stopped several cars believing each to be the Peisner vehicle indicates some probability that innocent people would be harassed. Under such a showing, the Supreme Court has held that probable cause did not exist. Henry v. United States, *supra* note 11, at 101. For a more recent case on the same point see United States v. Souther, 211 F. Supp. 848 (N.D. Tenn. 1962). Draper v. United States, *supra* note 9, serves as a good comparison case for *Henry* on the issue of the reliability of the informant and the chance of entrapping innocent people.

[17] 367 U.S. 717 (1961).

[18] United States v. Peisner, *supra* note 2, at 102. See Lockhart and McClure's article, *supra* note 5.

[19] Marcus v. Search Warrant, *supra* note 17, at 731.

the book distributor and retailers involved in the *Marcus* case. Also, in *Peisner* private facilities were being used so that there was no way of determining what specific books Peisner would have with him. In *Marcus*, on the other hand, the books were on the open racks where they could be purchased and a prior determination of their "obscenity" accomplished. Finally, the *Peisner* case involves a federal statute which prohibits the transportation of obscene matter in interstate commerce for sale or distribution. This statute has been applied several times in similar circumstances and arrests and searches have been made upon probable cause without any prior determination of obscenity as required in *Peisner*.[20] The court of appeals failed to discuss or distinguish any of these cases. In *Marcus*, a state statute and a state supreme court rule were involved which dealt with many types of contraband and described the procedure for their seizure. The Supreme Court in its opinion specifically limited itself to the facts of the *Marcus* case and held that the procedures *as applied* failed to afford sufficient protection for non-obscene material.

The court of appeals rationalized its extension of the *Marcus* case opinion by deriving from it a requirement that *any* search for obscene material must be justified by a prior determination that the specific materials sought are obscene under the *Roth* test.[21] Such a requirement is an important addition to the normal probable cause requirement for a search, which permits the searching officers to consider non-technical and incompetent evidence in making their determination as to cause.[22] Where the chance of obstructing the flow of non-obscene literature is great as it was in *Marcus*, such a standard appears reasonable in order to afford the public protection from overzealous police enforcement. But where the officers act upon facts indicating that there is little chance that anything but hard-core pornography will be seized under a federal statute specifically developed to reach such cases, as in *Peisner*, there is no reason for such a strict standard.[23]

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[20] United States v. Astore, 288 F.2d 26 (2d Cir. 1961), *cert. denied*, 366 U.S. 925 (1961); United States v. Russo, 284 F.2d 539 (2d Cir. 1960). The probable cause determination was not contested in these cases.

[21] United States v. Peisner, *supra* note 2, at 105.

[22] Brinegar v. United States, *supra* note 11, at 172:

> There is a large difference between the two things to be proved (guilt and probable cause) . . . and therefore a like difference between the quanta and modes of proof to require them.

[23] It is possible that the court of appeals in the *Peisner* case believed that obscenity in interstate commerce was not a sufficiently great social evil to permit anything less than the strictest possible test for unreasonable searches and seizures to be used. However, if this was the attitude of the court of appeals and the basis for its decision, it was going against the determinations of Congress and the Supreme Court that hard-core pornography is a social evil to be protected against. Roth v. United States, *supra* note 3, at 485. For a discussion of the constitutional standards in relation to hard-core pornography see Lockhart and McClure's article, *supra* note 5, pp. 58-68.