Recent Cases

CRIMINAL LAW—BORDER SEARCH—CONSTANT SURVEILLANCE NOT ESSENTIAL REQUIREMENT FOR INLAND BORDER SEARCH IF CIRCUMSTANCES JUSTIFY THE BELIEF WITH REASONABLE CERTAINTY THAT A VEHICLE IS BEING USED FOR THE ILLEGAL IMPORTATION OF MERCHANDISE.

On August 19, at approximately 1:00 P.M., an automobile driven by Looper was stopped and searched as it entered the United States from Mexico at Lukeville, Arizona. The customs agent found two small pieces of luggage but no contraband. Looper had a Virginia driver's license in the name of Lyme and a key to a motel in Sonora. The car had been rented in Tuscon in the name of Lyme but by the use of another person's credit card. Looper said he was a photographer however he had no photographic equipment with him.

At approximately 6:10 P.M., the customs agent received information that the same vehicle had again crossed the border from Mexico with one occupant and the same two small pieces of luggage. Failing to spot the vehicle on the main road north the agent realized that it had entered what is in effect a closed loop of highway. This closed loop, the entrance to which is approximately one mile north of the border, passes through an extremely desolate area. The agent stationed himself at the entrance, and at approximately 7:00 P.M., the vehicle emerged with two occupants. It was stopped by the agent. The passenger, Weil, provided identification, but would not respond to questions about where he had entered the United States. Upon opening the trunk, two large leather suit-

cases, in addition to the original small pieces of luggage, were found. There was a strong odor of marijuana. A search of the suitcases revealed contraband consisting of marijuana concentrate and other drugs.

A motion to suppress this evidence was granted by the district court on the apparent grounds that since there was no contraband in the vehicle when it entered the United States, it could not be subjected to a "border search", a search based on less than probable cause. On appeal to the Court of Appeals for the Ninth Circuit, *held*, reversed: a vehicle may properly be subjected to a border search, regardless of whether or not it has been kept under constant surveillance, if circumstances justify the belief with reasonable certainty that the vehicle is presently being used for the illegal importation of merchandise. *United States v. Weil*, No. 25,594 (9th Cir. Oct. 8, 1970).

It is the general rule that, whenever practicable, a search or seizure must be preceded by judicial approval in the form of a warrant based on probable causes.[1] In *Carrol v. United States*,[2] the Supreme Court stated:

> [Probable cause existed where] the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that [the offense was being committed.][3]

This two fold requirement of warrant and probable cause is the general and greatest burden of justification that the government must meet in order to conduct a search. Under certain circumstances, however, the burden on the government is reduced. The maximum reduction occurs at the international border and its immediate vicinity, where vehicles and persons may be searched based on unsupported or mere suspicion.[4]

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1. Terry v. Ohio, 392 U.S. 1, 20 (1968).
2. 267 U.S. 132 (1925).
3. *Id.* at 162.
4. See text accompanying note 12 *infra*. To be distinguished from border searches are searches under exigent circumstances wherein the requirement for a warrant is eliminated but the requirement for probable cause remains. *E.g.*, autombile in danger of being moved, Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); blood sample procurement where time required for obtaining a warrant would prevent a successful test for intoxication, Schmerber v. California, 384 U.S. 757 (1966); photographs seized in apartment for use in identifying fleeing robbers, Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967).

Compare also a search for weapons, appropriate under certain circumstances where based on less than probable cause, but limited in scope to a

Closely related to this search at the border is the search at some distance inland and at some reasonable time after contraband may have been smuggled into the United States. This latter search may constitutionally be based on less than probable cause if the circumstances are such as to justify the belief with reasonable certainty that customs laws are being violated.[5] Both types of search are included in the generic term "border search".[6]

The search for contraband is governed by federal statute which provides in part:

> Any of the officers or persons authorized . . . may stop, search, and examine . . . any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law . . . .[7]

To insure that the broad powers granted by this statute do not conflict with the fourth amendment, the statute has been construed so as to limit its application to border searches.[8] As stated in *United States v. Glaziou*:[9]

> A custom officer's unique power to conduct a "border search" is coextensive with the limits of our international border areas, and a search and seizure within these areas by a customs officer, reasonable enough under these circumstances, could perhaps be chal-

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superficial pat-down. Terry v. Ohio, 392 U.S. 1 (1968). It is important in any search situation to distinguish the external circumstances and the degree of intrusion into the privacy of the individual that is contemplated. Both factors are relevant in determining what standard of belief must be met before the search can commence. See note 13 *infra*.

5. See text accompanying notes 10 and 12 *infra*.

6. *Id.* Throughout this note, a search at or in the immediate vicinity of the border shall be described as such. A search not at the actual international boundary, but related to that boundary in such a way as to be proper where based on less than probable cause, shall be identified as a "border search".

7. 19 U.S.C. § 482 (1965). The search for illegal aliens is governed by a separate statute which provides in part that an officer may search any vehicle for aliens within a reasonable distance of the border. 8 U.S.C. § 1357(a)(3) (1970). Immigration searches may be made within 100 miles of the border. United States v. Miranda, 426 F.2d 283 (9th Cir. 1970). Such searches need not be based on probable cause or even a reasonable certainty that the alien will be found. Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970). However, they are limited to spaces in which an alien could reasonably be concealed. Valenzuela-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970).

8. United States v. Weil, No. 25,594 (9th Cir. Oct. 8, 1970) at 4.

9. 402 F.2d 8 (2nd Cir. 1968).

lenged as violative of the Fourth Amendment if conducted by different officials elsewhere. The term "border area" in this context is elastic . . . ; the precise limits of the border area depend on the particular factual situation . . . . For our purposes, it need only be said that "border area" reasonably includes not only actual land border checkpoints but also . . . a reasonable extended geographic area in the vicinity of any entry point.[10]

Alexander v. United States,[11] discussed the standard of belief necessary to conduct a border search.

> [I]t is well settled that a search by Customs officials of a vehicle, at the time and place of entering the jurisdiction of the United States, need not be based on probable cause; that "unsupported" or "mere" suspicion alone is sufficient to justify such a search for purposes of Customs law enforcement . . . .
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> Where, however, a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband . . . was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a "border search."[12]

The issue decided by the court of appeals in *Weil* was whether it was *essential* that before officers could conduct a border search they believe with reasonable certainty that any suspected contraband was aboard the vehicle when it crossed the international boundary.[13] A factor notably missing from the surrounding circumstances in *Weil*, was that of constant surveillance.[14]

The absence of such surveillance, coupled with the fact that at least a limited search had already been made at the border,[15] meant that any subsequent search might be directed toward the discovery of contraband placed in the vehicle while it was in the United States. The district court apparently concluded that such a search would not qualify as a border search, thus, it could not be conducted on less than probable cause.[16] An examination of recent Ninth Circuit cases explain the district court's conclusion.

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10. *Id.* at 12, 13.
11. 362 F.2d 379 (9th Cir. 1966).
12. *Id.* at 382.
13. No. 25,594 at 4. It should be kept in mind that *Weil* is concerned with the requisite degree of belief in order that a *vehicle* may be searched. The complexities involved in the search of a person are illustrated in Milchen, *Criminal Law at the International Border*, 6 SAN DIEGO L. REV. 1, 7 (1969).
14. The vehicle was unobserved for approximately 50 minutes. No. 25,594 at 4.
15. *Id.*
16. *Id.*

In *King v. United States*,[17] customs agents received information that certain automobiles would be entering the country with contraband. One of the vehicles was observed crossing the border. It was followed about eight miles and stopped. In upholding the subsequent search the court stressed that the vehicle had been kept in view at all times and that there was no change in its condition from the time it crossed the border until the stop. The court stated:

> Whatever was in the auto when it was stopped was in it when it crossed the border. We hold that where . . . officers receive information that a person or vehicle is about to cross the border with contraband . . . and where shortly thereafter a person or vehicle conforming substantially to the description . . . is seen to cross the border . . . is followed . . . and kept under surveillance until stopped and searched and where there is no reason to believe that there is any change in condition of such person or vehicle . . . so that whatever such vehicle contains or such person possesses at the time the search is made is the same as it was at the border . . . such search may be held to be a border search.[18]

In *Leeks v. United States*,[19] a stop and search approximately fifteen miles north of the border was upheld as a border search. Even though there may have been short periods of time when the vehicle was out of sight of all of the officers (following in separate cars) there was no break in the surveillance project.

In *Alexander v. United States*,[20] the court stated that a prerequisite to a valid border search was a belief with reasonable certainty by the agent that the contraband "was aboard the vehicle at the time of entry into the . . . United States."[21] To illustrate that the search in that case met this test for a border search, the court pointed out that the vehicle had been kept under constant surveillance, except for possibly one or two minutes, from the time of the observed border crossing.[22] In *Rodriguiz-Gonzalez v. United States*,[23] agents observed a pre-identified vehicle cross the border. It was followed to San Diego where it was parked until the following day when it was picked up by another driver. The court

17. 348 F.2d 814 (9th Cir. 1965). There was evidence of consent to the search. However the court chose to address the search and seizure issue.
18. *Id.* at 816.
19. 356 F.2d 470 (9th Cir. 1966).
20. 362 F.2d 379 (9th Cir. 1966).
21. *Id.* at 382.
22. *Id.*
23. 378 F.2d 256 (9th Cir. 1967).

determined that probable cause was not an issue to the subsequent stop because circumstances justified a valid border search.[24] Although the search was fifteen hours and twenty miles after the border crossing, the court stressed that, because of the constant surveillance, there was no "possibility that the marijuana found . . . was placed there at any time following entry into the United States."[25]

In *Lannom v. United States*,[26] the suspect vehicle was observed to cross the board, park, and be driven off by a different person. The subsequent search was upheld. In speaking to the issue of possession, the court quoted a passage from *Klepper v. United States*[27] which emphasized the actual observance of the contraband laden vehicle as it crossed the border.[28]

In *Bloomer v. United States*,[29] the pre-identified vehicle was observed crossing the border. After being parked and picked up by a new driver it was stopped and searched. In finding a valid border search, the court stressed that the vehicle was under constant surveillance, that no person entered it while in the United States except the defendant, and that he did not have sufficient time to deposit the contraband in the place of discovery.[30]

In *Castillo-Garcia v. United States*,[31] the suspect vehicle was observed crossing the border. After several stops and a change of drivers, the vehicle was finally stopped seven hours later and at a distance of 105 miles from the border. Because of the constant surveillance, the circumstances were found sufficient to a valid border search. The court stated:

> The distance from the border, whether it be 105 miles or 500 miles, is important only as it relates to the surveillance and any other circumstance which aids the fact finder in determining with reasonable certainty that any contraband which might be found in the vehicle . . . 'was aboard the vehicle at the time of entry . . . .'
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> In the instant case there was a change of drivers, but the fact that the marihuana weighed 165 pounds, coupled with the surveillance, obviated any possibility that it was placed in the car after the car entered the United States.[32]

These cases indicate that, prior to *Weil*, the Ninth Circuit was pos-

24. *Id.* at 257.
25. *Id.* at 258.
26. 381 F.2d 858 (9th Cir. 1967).
27. 331 F.2d 694 (9th Cir. 1964).
28. 381 F.2d at 862.
29. 409 F.2d 869 (9th Cir. 1969).
30. *Id.* at 871.
31. 424 F.2d 482 (9th Cir. 1970).
32. *Id.* at 485.

sibly developing the rule that once a vehicle had departed the immediate vicinity of the border, it could not be subjected to a border search unless it was certain that any suspected contraband was aboard the vehicle when it entered the country. In contrast to this apparent rule, the facts in *Weil*, (*viz.*, the initial and fruitless search at the border, the lack of constant surveillance, and the subsequent mysterious appearance of an additional person[33] in the car) indicated that the stop and search were made in the belief that contraband was placed aboard the vehicle *after* it had left the immediate vicinity of the border. The court explained its position:

> The language in these [earlier Ninth Circuit] cases must be considered in the light of the facts to which it relates. In each case, the government claimed that the facts showed that the contraband had been in the vehicle when it crossed the border; in each, that contention was upheld. It does not follow, in spite of rather restrictive language in some of the opinions that such a showing is the sine qua non of a "border search."
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> It seems obvious to us that the right of customs agents to search a vehicle without probable cause is not confined to vehicles that have crossed the border . . . . We also think that if customs agents are reasonably certain that parcels have been (a) smuggled across the border and (b) placed in a vehicle . . . they may stop and search the vehicle. Similarly, if the agents are reasonably certain that a person has crossed the border illegally, and has then entered a vehicle on this side of the border, we think that they may stop and search the vehicle and person. They can assume that he may have brought something with him.[34]

The rule may thus be stated: Customs agents may search a vehicle if circumstances are such as to justify the belief with reasonable certainty that (1) there is contraband aboard the vehicle and (2) the contraband is presently being illegally imported. Prior to *Weil*, it appeared that constant surveillance was an essential prerequisite to the inland customs search. Such surveillance made it certain that the particular vehicle was in the same condition as it was when it crossed the border;[35] this in turn assured that the

33. Note that the stop and search in *Weil* was also justified as an immigration check. Such a search would have been limited to a check on the nationality of the passenger and an inspection of the trunk and other spaces suitable for concealing aliens. The suitcases ordinarily could not have been opened. However the strong smell of marijuana no doubt would have justified a search based on probable cause. See note 7 *supra*.

34. No. 25,594 at 4.

35. Where it could have been stopped on mere or unsupported suspicion. See text accompanying note 12 *supra*.

search was directed toward illegal importation, rather than toward illegal possession,[36] of contraband. *Weil* has made it clear that the vehicle need not be so directly and positively linked to the border. The standard of reasonable certainty applies to *both* elements of the rule, *viz.*, that there is contraband aboard and that it is presently being imported.

LOUIS E. BOYLE

TAXATION—FEDERAL INCOME TAX—THE PORTION OF THE NET OPERATING LOSS DEDUCTION NOT ABSORBED IN THE "ALTERNATIVE" TAX COMPUTATION MAY BE CARRIED FORWARD TO ANOTHER YEAR, NOTWITHSTANDING THAT IT WAS CONSIDERED IN MAKING THE TENTATIVE TAX COMPUTATION UNDER THE "REGULAR" METHOD. *Chartier Real Estate Co. v. Commissioner* (1st Cir. 1970).

Chartier Real Estate Company had taxable income of $84,903.21 for its taxable year ended June 30, 1962, consisiting of long-term capital gains of $83,787.64 and ordinary income of $1,115.57.[1] The company computed its tax for the year under the alternative method provided by section 1201 of the Internal Revenue Code of 1954.[2]

In later years, the company incurred net operating losses which resulted in carrybacks to the taxable year which ended in 1962. Chartier therefore filed claims for refund for that year, requesting

36. A search for possession, as distinguished from illegal importation, would require probable cause. See text acocmpanying notes 3, 4, and 5 *supra.*

1. Chartier originally reported $83,964.70 as taxable income, but later agreed with the Commissioner to an increase in ordinary income of $938.51. Chartier Real Estate Co. v. Comm'r, 52 T.C. 346, 348 (1969).

2. INT. REV. CODE OF 1954, ch. 1, § 1201(a), 68A Stat. 320, *as amended,* INT. REV. CODE OF 1954, § 1201(a), provides:

> (a) Corporations.—If for any taxable year the net long-term capital gain of any corporation exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 11, 511, 821(a) or (c), and 831(a), there is hereby imposed a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of—
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> (1) a partial tax computed on the taxable income reduced by the amount of such excess, at the rates and in the manner as if this subsection had not been enacted, and
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> (2) an amount equal to 25 percent of such excess . . . .

All section references in the text are to the INT. REV. CODE OF 1954.