RECENT CASES

CRIMINAL LAW—SEARCH AND SEIZURE—DELIVERY OF CONTAINER TO AIRLINE FOR SHIPMENT DOES NOT CREATE EXIGENT CIRCUMSTANCE PERMITTING SEARCH WITHOUT WARRANT—AIRLINE CONSENT TO SEARCH FOR CONTRABAND IS INEFFECTIVE. *People v. McGrew* (Cal. 1969).

At about 4:00 P.M., June 25, 1967, Kenneth T. McGrew brought a new, securely locked footlocker to the United Airlines freight office at Lindbergh Field, San Diego for shipment to San Francisco. He consigned it to himself,[1] and stated on the way bill that it contained books and clothing. He informed the freight agent that he had another footlocker to ship, and that he was going to San Francisco on a midnight flight. The United freight agent, Charles J. Dowling, Jr., suspected that the locker contained marijuana. His suspicions were apparently based upon McGrew's appearance, the weight of the locker, and information that marijuana had been shipped in similar containers. He had been warned by his supervisor to "be on the alert for footlockers and suspicious people" and to "check out" any suspected contraband. After telephoning his supervisor for authorization, Dowling opened the footlocker by knocking out the hinge pins, and observed that it contained packages wrapped in newspaper or brown paper. He did not open any of the packages; however, because he previously had seen marijuana bricks wrapped in plastic, he believed the packages contained marijuana. After closing the locker, Dowling telephoned his supervisor and the police.

About 5:00 P.M., a San Diego police officer arrived and, after hearing Dowling describe what had happened, requested to see the footlocker. Dowling opened it, and the police officer removed and opened one of the packages. Mr. McLaughlin, a state narcotics agent,[2] arrived, removed and examined the packages, and determined that they contained marijuana.

1. McGrew used the name "Kent McGraw" in shipping the footlockers, but the fact that he had used a fictitious name apparently did not come to the attention of officers until after his arrest.

2. The California Supreme Court erroneously describes Agent McLaughlin as a federal narcotics agent.

Dowling notified the other airlines to be on the lookout for McGrew. About 8:00 P.M., McGrew took a second footlocker to Western Airlines and consigned it to himself in San Francisco. A Western Airlines freight agent called Dowling, and the officers proceeded to Western Airlines to investigate. After depressing the lid of the footlocker and detecting the odor of marijuana, Agent McLaughlin requested Western Airlines employees to open it. They opened it by removing the hinge pins, and Agent McLaughlin removed its contents, paper-wrapped marijuana bricks.

At about 11:00 P.M., McGrew bought a ticket to San Francisco at the Western Airlines counter and checked a suitcase. Airline employees pointed out McGrew to Agent McLaughlin in the airport restaurant. McLaughlin and another officer arrested McGrew, searched him, and recovered the Western Airlines baggage claim ticket. They retrieved the bag from the luggage counter, and upon searching it, discovered more marijuana.

The Superior Court of San Diego County granted McGrew's motion to suppress the evidence, reasoning that the initial search by Dowling, the United Airlines employee, was conducted solely for police purposes and in response to police suggestion. The court concluded that Dowling was acting as a police agent,[3] that the initial search was unlawful, and that this illegal seizure of contraband led to the other evidence sought to be suppressed and to the arrest of the defendant.

The district court of appeal reversed,[4] finding that no police agency existed in the initial search by Dowling since the police had not requested him to open the footlocker. Whether the suggestion to be on the alert for such footlockers originated from a police organization was considered immaterial. The court further concluded that since private searches are not within the fourth amendment, it was unnecessary to show that Dowling had probable cause to search.[5] It determined that the police did have probable cause to search on the basis of the information provided

3. Record at 6-J.

4. People v. McGrew, 75 Cal. Rptr. 378 (1969).

5. The holding that the fourth amendment does not apply to conduct of private individuals, announced in Burdeau v. McDowell, 256 U.S. 465 (1921), has been subject to vigorous criticism but was followed recently by the California Supreme Court in People v. Superior Court of Los Angeles, 70 Cal. 2d 123, 449 P.2d 230, 74 Cal. Rptr. 294 (1969).

by Dowling. Having probable cause to search, the police were excused from obtaining a warrant because the goods were in the course of transportation.[6] The search of McGrew's suitcase was held lawful not only because it was incident to a lawful arrest, but also because there was probable cause to believe that it contained contraband.

On appeal to the Supreme Court of California, *held*, affirmed and the opinion of the district court of appeal vacated: exigent circumstances sufficient to permit a search without a warrant did not exist, defendant had not consented to search for other than airline purposes, the airlines did not have authority to consent to the police search, the police did not reasonably believe the airlines had such authority, and there was not probable cause to arrest the defendant.[7] *People v. McGrew*, 1 Cal. 3d 404, 462 P.2d 665, 69 Cal. Rptr. 473 (1969).

I. EXIGENT CIRCUMSTANCES PERMITTING A WARRANTLESS SEARCH

In determining that the searches without warrant were not excused, the court cited *People v. Marshall*[8] in which it delineated the circumstances permitting warrantless searches. These circumstances are as follows: (1) the search must be incident to a lawful arrest; or (2) there must be a danger of imminent destruction, removal or concealment of the property intended to be seized, or a probability of a material change in the situation during the time necessary to obtain a search warrant.[9] In *Marshall*, the court was concerned specifically with the search of a dwelling, but in *McGrew* it held that the *Marshall* requirements applied equally to the search of effects.[10]

The court of appeals held that the rule permitting a warrantless search of automobiles applied to freight or baggage

6. 75 Cal. Rptr. at 381. The court of appeal cited Carroll v. United States, 267 U.S. 132 (1925), where it was held that an automobile or other vehicle can be searched without a warrant if there is probable cause to believe that it contains contraband. In *Carroll*, the Court distinguished the search of a structure from the search of a ship, boat, wagon, or automobile where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. *Id.* at 153.

7. People v. McGrew, 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).

8. 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968).

9. *Id.* at 61, 442 P.2d at 671, 69 Cal. Rptr. at 591.

10. 1 Cal. 3d at 409, 462 P.2d at 4, 82 Cal. Rptr. at 476.

in transit. However, permitting the search of a vehicle without a warrant is based upon the danger that the vehicle might be moved before a warrant can be obtained.[11] In reversing the court of appeal on this point, the *McGrew* court pointed out that the footlockers were in the custody of the airlines, apparently safe from imminent destruction, concealment or removal;[12] thus the rationale upon which the automobile exception is based was inapplicable.

Given probable cause, it would appear that a warrantless search would have been justified under *Marshall* if McGrew had attempted to reclaim the footlockers or if the airlines had attempted to ship them to San Francisco, since in either case there would have been an imminent danger of removal. Moreover, it should not be necessary for the police to seize the footlockers while awaiting a warrant. The airlines certainly have an independent interest in refusing to ship what they believe to be contraband. Knowlingly aiding in the transportation of marijuana is a criminal act;[13] the airlines have no contractual duty to transport goods in violation of the law; and to suggest that airline refusal to engage in a criminal shipment could be considered an unlawful seizure, even if the police suggested that the goods contained contraband, would appear preposterous.[14]

Under the circumstances of *McGrew*, it seems clear that a search without a warrant was not excusable under *Marshall* standards. The court's holding in this respect was entirely consistent with prior California law, and does not appear to impose an undue burden on law enforcement.

II. CONSENT TO SEARCH

The People contended, *inter alia*, that by shipping his baggage subject to tariff conditions granting authority to inspect,

11. *See* note 6 *supra.*

12. 1 Cal. 3d at 409-10, 462 P.2d at 4-5, 82 Cal. Rptr. at 476-77.

13. CAL. HEALTH & SAFETY CODE §§ 11530-31 (West 1955).

14. The court pointed out that the carrier had no contractual duty to ship the packages before a warrant could be obtained. In Gold v. United States, 378 F.2d 588 (9th Cir. 1967), an airline freight manager opened and examined the contents of a package after federal agents had advised him that information on the way bill was erroneous. He discovered pornographic films and called the agents. After the agents viewed the films, they advised the agent to lock them up while they obtained a warrant. The court concluded that the airline had a legitimate interest in examining the packages to determine whether the contents were fit for carriage. The court apparently assumed the carrier had no duty to ship goods that were not "fit for carriage." *Id.* at 581.

McGrew had consented to the search of his baggage.[15] It was asserted that he had no "reasonable expectation of privacy" under the standard of *Katz v. United States*.[16] Since he voluntarily delivered the footlockers into the custody of the airlines, stated the contents, and gave the airlines limited authority to search the footlockers, there was no "reasonable" expectation that the contents would remain private: thus a search for any purpose was not unreasonable, or violative of the fourth amendment.[17] Similarly, it was argued that one's subjective desire that the search not be conducted should not be controlling if consent to search has been granted.

Initially, the court impliedly doubted that McGrew had consented to any search when it noted that the tariff provision purporting to grant the right to search was not expressed in the document which he signed, but only was incorporated by reference.[18] Its rejection of the owner's consent theory was not based on the proposition that he had not consented to any search, however. Instead, the court applied the reasoning of *Stoner v. California*[19] and examined the scope of the consent. It concluded that the consent, if any, was for the airlines to inspect for airline purposes. Any search by other than airline personnel or for purposes other than those for which the airlines might reasonably be expected to search could not be considered to have been consented to by the shipper. In the court's view, the airlines could reasonably be expected to inspect only for safety purposes or to insure that goods were not overvalued or going at a lower tariff rate than they should.[20]

It is clear that one may contractually consent to a search,[21] but consent must be knowing and intentional.[22] It is doubtful whether McGrew was aware of the tariff provision permitting

15. Brief for Appellant in Reply at 3-16, People v. McGrew, 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).

16. 389 U.S. 347 (1967).

17. The court construed the People's argument as involving a waiver of fourth amendment rights. 1 Cal. 3d at 411, 462 P.2d at 5, 82 Cal. Rptr. at 477.

18. *Id.* at 410 n.3, 462 P.2d at 5 n.3, 82 Cal. Rptr. at 477 n.3.

19. 376 U.S. 483 (1964).

20. *See* 1 Cal. 3d at 412, 462 P.2d at 6, 82 Cal. Rptr. at 478.

21. Zap v. United States, 328 U.S. 624 (1945).

22. Stoner v. California, 376 U.S. 483 (1964); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965).

airline inspection of shipments,[23] and it is certainly unlikely that he intended to give his consent to a police search of his footlockers. Thus, the holding that he had not consented to a police search is entirely consistent with *Stoner* and similar cases.[24]

The People's contention that McGrew did not have a reasonable expectation of privacy as to the contents of his footlocker is logical, but somewhat strained. In order to show that McGrew did not have a reasonable expectation of privacy, it would appear necessary to show that he intended to expose the contents of the lockers to public view or, that by shipping them, he was likely to expose them to public view.[25] In the absence of a showing that some significant percentage of containers are routinely inspected, it is reasonable for one to expect that his baggage will not be inspected. It is not surprising that the court attached little weight to this argument.[26]

III. THIRD PARTY CONSENT TO SEARCH

Citing *People v. Hill*[27] for the proposition that the police search would have been lawful if the police had reasonably and

23. In March 1970, the writer observed a sign approximately 3 feet by 2 feet at the United Airlines passenger desk at Lindbergh Field indicating "Passengers and Baggage Subject to Search under—Federal Laws—FAA Safety Regulations." No such sign was in evidence at the United freight office, and it is not known how long the sign has been at the passenger counter. Each counter has a small sign indicating that tariff regulations are available for inspection.

24. The court also relied on Corngold v. United States, 367 F.2d 1 (9th Cir. 1966), another airline search case in which the initial search of packages by airline employees was in the presence of and at the specific request of government agents. This was characterized as a government search.

25. In Katz v. United States, 389 U.S. 347 (1967), the Court, in stressing that the fourth amendment protects people, not places, pointed out:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351-52.

26. In the event that airlines do begin inspecting all shipments for concealed bombs, it would appear that shipping anything by air would be "knowingly" exposing it to the public. *See* Frick, Gordon & Patterson, *Aircraft Hijacking: Civil and Criminal Aspects*, 22 U. FLA. L. REV. 72 (1969), for an interesting discussion of measures currently implemented and planned to detect weapons and explosives on airlines.

27. 69 Cal. 2d 550, 446 P.2d 521, 72 Cal. Rptr. 641 (1968). *Hill* involved a case of mistaken identity. The police arrested another, whom they reasonably believed to be Hill, in Hill's apartment. They made a search incident to the arrest obtaining evidence incriminating Hill. The search was held reasonable although it was conceded that the good faith mistake rule was subject to criticism.

in good faith believed the airlines had authority to consent to the search, the court concluded that in *McGrew* such belief was not reasonable.

In *McGrew*, the court amplified the rule of *Hill*. For the police belief to be reasonable, "there must be some objective evidence of joint control or access to the places or items to be searched which would indicate that the person authorizing the search has authority to do so."[28] The good faith mistake rule does not apply where the third party makes clear that the property belongs to another or where the relationship of the parties is such that it is clear that the owner of the property has not authorized the third party to act as his agent.[29] The court concluded that since the police had no reason to believe that the shipper had authorized the airline employee to turn the trunk over to the police, they had no reasonable, good faith belief in his authority to consent to their search.

Practically speaking, *McGrew* would appear to bar any third party consent to search unless the third party has actual legal authority or unless the police are mistaken as to the factual interrelationship between the third party, the defendant, and the place or thing to be searched. Thus, a mistake as to the legal effect of the relationship, which the police apparently made in this case, will not make third party consent effective. On the other hand, a reasonable though mistaken belief that the consenting party is the defendant or that the third party is the owner of the item searched would meet the test.

To the extent that the court's test of reasonableness induces police to obtain warrants in doubtful cases, it provides helpful guidance. To the extent that it may bar relevant evidence by classifying a mistake of law as unreasonable, it is unfortunate. The exclusionary rule of the fourth amendment is designed to deter unlawful conduct.[30] The exclusion of relevant evidence is a harmful result flowing from the application of the rule.[31] To apply the rule when it does not deter and when the police reasonably

28. 1 Cal. 3d at 412, 462 P.2d at 6, 82 Cal. Rptr. at 478.
29. *Id.* at 413, 462 P.2d at 7, 82 Cal. Rptr. at 478.
30. Elkins v. United States, 364 U.S. 206, 217 (1960).
31. *Id.* at 216.

believe their conduct is lawful so that it excludes relevant evidence appears to serve no useful purpose.[32]

IV. PROBABLE CAUSE TO ARREST

The court's discussion of circumstances permitting a warrantless search was apparently based on the assumption that the police had probable cause sufficient to obtain a valid warrant to search the footlocker shipped with United Airlines; however, the information which the police had was held not to provide probable cause for his arrest. The court noted that the only untainted incriminating information which the police had was the weight of the footlocker and the knowledge that it contained packages wrapped in brown paper or newspaper.[33] The court considered this information consistent with McGrew's statement that the footlocker contained books and clothing.[34] Unfortunately, the court did not say definitely whether there was probable cause for the initial search, and one is left to speculate whether a warrant obtained for the first police search based upon this same information would have been valid.

The standard of probable cause for search is approximately the same as that for arrest,[35] and in doubtful cases, the weighing by a judicial officer is required.[36] It is reasonable to speculate that if a magistrate, rather than the police, had made the determination of probable cause, the court would have accepted that determination. However, the opinion is not helpful in this regard.

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32. *See* Amsterdam, *Search, Seizure, and Section 2255*, 112 U. PA. L. REV. 378, 388-89 (1964), wherein it is stated:

> The rule is unsupportable as a reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of . . . law-enforcing officers.' [T]he rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease.

(Citations omitted.)

33. Although the initial search by Dowling may have been wrongful, the information obtained thereby was not in violation of the fourth amendment. *See* note 5 *supra*.

34. The footlocker weighed 112 pounds. It was admitted that a locker filled with two-thirds clothing and one-third books would weigh about the same. 1 Cal. 3d at 407, 462 P.2d at 2-3, 82 Cal. Rptr. at 474. The court noted that the packages could have been wrapped books. *Id.* at 414, 462 P.2d at 7, 82 Cal. Rptr. at 479.

35. People v. Govea, 235 Cal. App. 2d 285, 296, 45 Cal. Rptr. 253, 260 (1965).

36. Jones v. United States, 362 U.S. 257, 270-71 (1959).

V. THE PRIVATE SEARCH

The trial court's order to suppress was based squarely on the holding that Dowling, the United Airlines employee, was acting as a police agent when he initially opened the footlocker.[37] The district court of appeal specifically overruled this holding.[38] The California Supreme Court found it unnecessary to decide the issue, and it is not clear what view the court would adopt. The reasoning upon which the holding regarding consent to search is based raises the inference that the court did consider Dowling a police agent: It suggests that "airline purposes" are limited to inspections for aircraft safety or tariff violations "where a danger or inconsistency [is] observed."[39] A search for contraband is characterized as "totally unrelated to the interests of the airlines."[40] If a search for contraband is unrelated to airline interests and is not made for airline purposes, then logically, it is conducted for police purposes. A logical, although not inevitable, next step is to reason that one who conducts a search for police purposes rather than private purposes should be considered a police agent. In *Stoner v. California*, the United States Supreme Court cautioned against the application of *strained* concepts of agency in finding authority for consent to search.[41] It would appear equally important to avoid applying strained concepts to find police agency.

VI. CONCLUSION

McGrew is an unsatisfying case because it provides less guidance than it might have in the areas of probable cause, third party consent to search, and private parties as police agents, and it further accentuates the uncertainty surrounding the law of search and seizure. The airlines, in particular, are given little guidance as to what they should do if they suspect an individual is attempting to ship contraband. *McGrew* does repeat, with unmistakable clarity, the admonition to law enforcement agencies that the right way to conduct a search is with a search warrant.

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37. *See* note 3 *supra.*

38. "Whether the suggestion airlines be on the alert for such footlockers originated from the police is immaterial. . . . The police do not necessarily make agents of citizens they warn concerning crimes." 75 Cal. Rptr. at 381.

39. 1 Cal. 3d at 412, 462 P.2d at 6, 82 Cal. Rptr. at 478.

40. *Id.*

41. 376 U.S. at 488.