In the

Supreme Court of the United States

United States Of America)
)
Petitioner)
)
V.)
) No 74-538
Henry Ogle Watson,)
)
Respondent.)
)

Washington, D. C.
October 8, 1975

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v. No. 74-538

HENRY OGLE WATSON,

Respondent.

Washington, D. C.

Wednesday, October 8, 1975

The above-entitled matter came on for argument at 10:56 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530 for the Petitioner.

MICHAEL D. NASATIR, ESQ., Nasatir, Sherman & Hirsch, 8383 Wilshire Boulevard, #510, Beverly Hills, California 90211 for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 74-538, United States against Watson.

Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY ON

BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court: This case is here on writ of certiorari to review a judgment of the Court of Appeals for the Ninth Circuit reversing respondent's conviction on the grounds that the stolen credit cards he was convicted of possessing had been obtained by postal inspectors during an illegal search of responsent's automobile and should have been suppressed as evidence at his trial.

I will state the case at some length, not because the facts are particularly complicated but because they demonstrate so convincingly that the decision of the court of appeals was erroneous and should be reversed.

On August 17, 1972, Postal Inspector Frank Barbarick received a telephone call from Awad Khoury, an informant who had supplied accurate information to Barbarick on a number of prior occasions. The informant told Barbarick that respondent Watson was in possession of a stolen Bank of America credit card and planned to turn the card over to Khoury.

Later that day Khoury met with Barbarick and turned

over a credit card such as he had described. The inspector ascertained from the Bank of America that the credit card had been mailed three days earlier and had never reached its intended customer.

The informant told Barbarick that he and respondent had an agreement: respondent would furnish the informant with additional credit cards stolen from the mail, and the informant would purchase airline tickets and merchandise with the cards. Inspector Barbarick instructed the informant to set up another meeting with respondent to obtain the additional credit cards. Although there was sufficient time to have obtained a warrant for respondent's arrest during the time that passed between this initial contact and the actual arrest, the postal inspector made no attempt to do so.

After several postponements, a meeting was finally held between the informant and respondent at noon on the 23d of August at a restaurant in Los Angeles. At the designated time, the informant met and at a nearby table there were two postal inspectors stationed. Inspector Barbarick had instructed the informant that if respondent were in possession of stolen credit cards, the informant should light a cigarette as a signal to the surveilling agents in the restaurant. The agents would then activate a beeper which would inform agents positioned outside the restaurant.

At the meeting the informant learned that respondent

had the credit cards outside in his car. He lit a cigarette and the agents in turn activated their signal. Inspector Barbarick and other agents entered the restaurant and placed respondent under arrest for possession of stolen mail and specifically for possession of the card that the informant had turned over to Inspector Barbarick six days earlier.

The inspectors escorted respondent out of the crowded restaurant and searched him, but they did not find the credit cards on his person. Respondent was then given Miranda warnings. Respondent who had previously been an informant for Inspector Barbarick and who knew him well said in response to the Miranda warnings, "Frank," -- which was Barbarick's first name -- "I understand my rights." The inspector then asked respondent where his automobile was located, and respondent pointed to a car nearby. Then the inspector said, "Can I look inside?" And respondent said, "Go ahead."

Then the inspector said, "You know, if I find anything, it is going to go against you."

And respondent said, "Go ahead, there is nothing in there."

Respondent then gave the inspector the keys which opened the locked car and Inspector Barbarick and another inspector searched the car and found under a floor mat an enveloped containing two pieces of stolen mail, each with credit cards inside them. These two pieces of mail, together with --

these two credit cards, together with the credit card supplied six days earlier by the informant, formed the basis of the indictment returned against respondent for possession of stolen mail.

Prior to trial respondent moved to suppress the stolen credit cards. He made several arguments, first that the informant was not a reliable informant and therefore there was no probable cause to arrest respondent; second, that a warrant was required for respondent's arrest; and third, that respondent's consent to the search of his automobile was invalid because he had not been told that he could withhold his consent. The district court denied the motion and respondent's trial proceeded.

He was convicted by a jury on the two counts involving the credit cards found under the floor mat of his automobile. He was acquitted on the count involving the credit card turned over six days earlier by the informant to the inspector. A divided panel of the court of appeals reversed the conviction. The majority concluded that the information gathered by Inspector Barbarick from the informant was reliable, was confirmed by physical receipt of a stolen credit card, that it did provide probable cause to arrest respondent and therefore rejected that argument that respondent had made.

It held, however, that because the officers had not sought or obtained a warrant for respondent's arrest during the

six days between the acquisition of probable cause and the meeting at the restaurant, the arrest was unconstitutional.

Proceeding from that conclusion, the majority then held that consent respondent gave to search his automobile was defective. It purported to adhere to the totality of all the circumstances test enunciated by this Court in Schneckloth v. Bustamonte, but stated nevertheless that the consent was involuntary because respondent was in custody in violation of the Fourth Amendment.

QUESTION: Do you think the court of appeals' holding amounted to a statement that a respondent like the one here who had been illegally arrested could not under any conceivable circumstances give a valid consent to a search of this kind?

MR. FREY: Well, I think the court of appeals did not expressly put it in those words, but every single fact that would bear on the actual voluntariness of respondent's actions tended to point toward voluntariness. I think it must be viewed in effect upon analysis of the per se rule there would be three factors: One, custody; two, illegal; and three, the lack of a specific Miranda type warning of a right to withhold consent, although as I will argue later there was effectively a communication of the right to withhold consent in this case.

The case thus presents the Court today with two issues.

QUESTION: Excuse me, Mr. Frey. The per se rule, do you think they made a per se rule both on the arrest factor and on the consent, or just on the consent?

MR. FREY: Well, the rule on the arrest issue would turn on certain facts, I think. In other words, it would turn on the question of whether there was an opportunity, whether in fact they had acquired probable cause, whether they had an opportunity subsequent to the acquisition of probable cause to obtain a warrant. The rule then would be that an arrest is illegal if they had acquired probable cause and had passed up the opportunity to get a warrant. So in that sense I suppose it's a per se rule.

QUESTION: The only fact determination left to be made is on the time, is that not so?

MR. FREY: I think it would be equivalent to the emergency doctrine for search warrants of homes, that is, the Government would be required to show exigent circumstances that justified the failure to get a warrant. Otherwise the arrest would be unlawful.

QUESTION: What case has held that a warrant must be obtained simply because there is time to obtain it?

MR. FREY: An arrest warrant?

QUESTION: Yes.

MR. FREY: No case.

QUESTION: So that they have established the rule

that if there is time to get a warrant, an arrest without a warrant is invalid, is that not the holding here?

MR. FREY: That's correct. And it is definitely a new rule.

QUESTION: That's a per se rule, isn't it?

MR. FREY: Yes, it is a per se rule, although unlike the rule on -- the rule on the consent issue, you look at three relatively concrete isolated and inflexible kind of facts, and if you find those three facts, then there can't be a valid consent. Here there is a factual inquiry to exigent circumstances which can't be pinned down as quite specific or narrow inquiry, but it is a per se rule once you've gotten across the factual threshold.

Now, the two questions that are presented to the Court today, both the question regarding the need to obtain a warrant for an arrest and the question regarding the ability of one in custody and in illegal custody to consent to a search are questions of great practical importance to everyday law enforcement.

I believe, turning first to the arrest issue, that it would be a considerable understatement to say that the decision of the court of appeals represents a sharp break with tradition and history. The Federal rule, the rule in each of the 50 States, the common law rule, the rule I dare say that each of you learned as black letter law during your first year of

criminal law course in law school is that a law enforcement officer may make a warrantless arrest for a felony on the basis of probable cause, at least so long as the arrest does not entail an entry into a dwelling or similar place.

This proposition has been recognized in numerous decisions of this Court during the past 50 years, from the Carroll case to last term's decision in Gerstein v. Pugh. It is reflected in section 3061 in title 18 of the United States Code, which authorized Inspector Barbarick to arrest respondent without a warrant on the very circumstances of this case. Neither we nor respondent have been able to find a single case in the entire anals of Anglo-American jurisprudence holding otherwise.

The court of appeals relied on the Coolidge case, but I think it's quite clear that Coolidge does not support the conclusion it reached. Coolidge was clearly and repeatedly focused upon the problem of an entry into a dwelling or similar place, a privacy invasion of that nature in connection with an arrest. We have no similar ingredient in the present case.

Given this background, then, I submit that even if it were otherwise desirable, this Court would not be free to overturn this consistent and heavy weight of precedent and to hold that this time for the first time that warrants are required as a constitutional matter. Even if the Court did consider itself free as a jurisprudential matter to adopt the

radical constitutional departure embodied in the holding of the court of appeals, there are good reasons of policy and practice that counsel against such a step. And we have made these arguments in our brief, and we advance them without intending in any way to minimize the seriousness of being arrested. We recognize that an arrest is an intrusion into individual liberty of substantial dimensions. We recognize that this Court has repeatedly looked carefully at the circumstances surrounding an arrest and has required that the officers have substantial justification amounting to probable cause in order to make a lawful arrest.

The question here before us is whether a warrant should be required.

Now, I think there is one structural difference which I would like to mention this morning between a search of a dwelling,which this Court has recognized in the absence of exigent circumstances does require a warrant, and an arrest. If a warrantless search is made and items are seized or indeed if nothing is seized, there is no judicial accounting that necessarily takes place as a result of that action. It may never come to the attention of the courts. Indeed, this is the problem, I think, that underlies the whole rationale of the warrant requirement, the reason that has impelled this Court to impose a warrant requirement, is to insure some degree of judicial supervision. Only upon a motion for

suppression of evidence or return of property which may be made many months later by the person who was the subject of the search is there judicial review. Quite the contrary is the case where an individual is arrested, the law both federally and in the States and as a result of Gerstein v. Pugh requires a reasonably prompt judicial determination of the adequacy of the grounds underlying the arrest. This to us is a substantial counterweight neutralizing to some extent the desirability that otherwise might be viewed to exist for obtaining a warrant prior to arrest.

There are also a lot of practical problems with requiring an arrest warrant and this case I think illustrates very well some of those problems. Even when suspicion focuses on a suspect, the decision whether or not to arrest them is often not made immediately. Instead further investigation is undertaken, either with the goal of securing additional evidence or alternatively of demonstrating the suspect's innocence. Here an effort was made to obtain further confirmation by catching respondent red-handed with stolen credit cards if it was possible to do so, and indeed it was successful in this case.

Now, respondent seeks to explain away our arguments that it is undesirable to force officers to seek warrants as soon as they have acquired probable cause by saying that, well, the police can wait, they don't have to acquire a warrant right away. The only thing they have to do is get a warrant before

making the arrest.

But I think that argument doesn't work, because as in this case, once the decision is made to arrest, the need often is sudden to do so. Here, in other words, the investigation was proceeding, I think it's quite apparent from my recitation of the facts that no decision had been made whether or not to arrest the respondent or when to arrest him until the signal was given in the restaurant which indicated that he was in possession of additional stolen credit cards. At that point he was -- the officers had probable cause to believe that he was then and there committing a new crime. Now to say that because they had failed to get a warrant previously they were powerless to arrest him seems to me a very undesirable result. Indeed, even if the innovation of the court of appeals in the constitutional law of arrests were correct as a general proposition, it was wrongly applied to this case because here there was probable cause, fresh probable cause to arrest the respondent for a fresh offense.

I would like to turn to the question of validity of respondent's consent to the search of his automobile, and I hark back to some of the facts of the case as I stated them earlier. The respondent knew the arresting officer, he was on a first-name basis with him. The situation was casual,even friendly, and the dialogue indicated a request for a consent to search, a consent followed by a warning that if anything

were found, it would go against the respondent, followed by a repeated almost demand that the inspector search the automobile. It's obvious from those facts that the respondent not only willingly consented to the search, but that he believed it would benefit him because the inspector would fail to find the stolen mail that respondent had hidden under the floor mat of his car.

It's also clear, I think, from the facts, although the court of appeals says otherwise, that respondent knew he didn't have to consent. Again, under the holding of this Court in Schneckloth, an actual concrete warning with respect to the right to withhold consent is not necessary and its presence or absence is simply a factor to be taken into account. Presumably that means that it is to be taken into account realistically on the facts of this case,and where an arrested person is practically insisting that his car be searched, I think it's difficult to find that there was not a voluntary consent.

QUESTION: Wasn't the holding in Schneckloth limited to the noncustodial situation?

MR. FREY: Absolutely, and I am turning to that next. It is true that Schneckloth explicitly refrained from passing on the custodial situation. However, six courts of appeals that we have been able to find, the Second, Fourth, Fifth, Seventh, Eighth and Ninth Circuits, all have passed on that

issue, and indeed the court below in this case said that consent alone, just like the lack of a warning of a right to withhold consent, is not a per se factor that would be automatically dispositive of the validity of the consent, but custody is a factor to be taken into account. It seems to me clear that if a person in custody can give a valid confession as Miranda recognizes he can, that a person in custody can give a valid consent to a search. Of course, if he has been taken away and he has spent six hours in the back room of a police station, that would be a significant factor in evaluating the voluntariness of his consent.

So I think that it is not necessary to dwell at substantial length on the factor of custody because it seems to me that the overall reasoning and structure of the Schneckloth decision and the principles that underlay it apply equally to the factor of custody. It is possible to look at custody and to determine the circumstances of custody and from that make a decision whether or not the consent that's given to a search is a voluntary consent. And there is, I think, no need for a per se rule and the courts of appeals seem to be in universal agreement on that question.

QUESTION: I assume that this is all a very short time, from the time he was picked up --

MR. FREY: I think the record indicates about 15 minutes. The search itself was about 15 minutes, but he was

removed from the restaurant, arrested, told what he was arrested for, searched, and then the conversation promptly ensued.

QUESTION: I mean, the time of his consent was very shortly after he was arrested.

MR. FREY: Right. It was an on-the-street, prompt consent. And, of course, the period of time that passed would be significant; in the Rothman case in the Ninth Circuit which was cited by the court of appeals and is cited by my opponent, several hours had passed during which repeated requests had been made to the suspect in custody to permit the search of his bag and he had refused over and over and finally he was told that the officers would get a warrant, although in fact they hadn't the least basis to get a warrant, and at that point he said, "What the heck, go ahead and search it."

Well, that's quite a different case from what we have here.

So turning from the fact of custody alone to the question of the illegal nature of the custody -- and I am assuming arguendo for purposes of this argument that respondent's custody was illegal -- it's clear that the illegality is in almost all cases totally irrelevant to the kind of voluntariness analysis that was applied in Schneckloth for assessing the validity of a consent. The voluntariness of respondent's consent could not possibly have been affected by what he didn't

know, to wit, that the court of appeals two years later would hold that his arrest was illegal for lack of a warrant.

Since the legality or illegality of the arrest couldn't have impinged on his consciousness or indeed on the consciousness of the postal inspectors under the circumstances of this case, unless the Court is simply going to throw away the voluntariness analysis, the illegality can't play a role in that analysis.

So in connection with the consent, I think the only tolerable issue that really exists is the fruit of the poisonous tree question, and that is a question that was not adverted to at all or relied upon in any way by the court of appeals. In other words, the argument is whether or not the consent was voluntary if it was the product of an illegal arrest par the deterrent purposes of the Fourth Amendment exclusionary rule might be served by treating the consent as an invalid fruit. We think such an argument is untenable on the facts of this case, and we think that result is clear from this Court's decision in Brown v. Illinois.

In Brown the Court asked the question whether the statements there obtained by an illegally arrested individual after he had been given Miranda warnings but during a period of illegal detention were obtained by exploitation of the illegality of his arrest. The Court rejected any but-for rule that said simply it would be enough for the defendant to show

that he might not have made the statement or here he might not have consented had he not been arrested. Instead it looked at exploitation of illegality. It looked at the behavior of the officers in the case, particularly, said the Court at page 13 of the slip opinion, "The purpose and flagrancy of the official misconduct."

Now, in the present case, there was not and there could not have been any exploitation of the illegality that existed in the present case. The illegality, if there was any, was not that they had no right to arrest him as such, not that there was not adequate justification for taking Mr. Watson into custody, but that they did not possess a warrant.

Now, of course, their possession or nonpossession of a warrant can have no possible bearing on whether or not a consent would be given to search of the automobile. Consequently, it seems to me quite clear that there could have been in the circumstances of this case no exploitation of an illegality for the purpose of obtaining a consent, and that under Brown, I think, is the pertinent criterion. So I think in this case we have the consent as an independent, voluntary act untainted by any illegality that there may have been in the arrest.

Finally, in connection with the consent issue I would like to point out that the respondent did not testify at the suppression hearing. He never got up and said one word about the involuntariness, one word about his state of mind in

granting the consent. There was no contradiction of the inspector's version of the events.

Now, unless there is to be a per se rule, I think that a defendant is going to have a very difficult time establishing involuntariness without getting on the stand, and, of course, there are no self-incrimination problems because his testimony at the suppression hearing could not be used against him in the trial. So we don't have a Fifth Amendment justification for not taking the stand, and I submit that ordinarily unless the other evidence demonstrates plainly that the consent was involuntary, that the absence of testimony by a defendant would be a very significant factor in the voluntariness inquiry.

For all of these reasons, we request this Court to reverse the judgment of the court of appeals and to reinstate respondent's conviction..

I will reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Frey.

Mr. Nasatir.

ORAL ARGUMENT OF MICHAEL D. NASATIR

ON BEHALF OF THE RESPONDENT

MR. NASATIR: Mr. Chief Justice, and may it please the Court: The last part of petitioner's argument in this case, I think, states and clearly states how the petitioner has misstated the issue in this case.

The issue in this case is not whether the police had time to get a warrant, and just because they waited six days they had to get a warrant for petitioner's arrest. The issue in this particular case is that the prosecution failed to carry its burden as it had, as it didn't produce a warrant, failed to carry its burden on these particular facts and in these particular circumstances.

Of course, it failed to carry its burden on the two crucial points --

QUESTION: Failed to carry its burden where, in the district court or the court of appeals?

MR. NASATIR: In the district court and the court of appeals.

QUESTION: The district court ordered suppression?

MR. NASATIR: No, excuse me. Just in the district court at the hearing.

QUESTION: You mean just in the court of appeals, don't you?

MR. NASATIR: I mean just in the district court. In the district court at the hearing, the prosecution had the burden of proving, one, that the arrest was legal and proper and was made with probable cause, since they didn't have an arrest warrant, and, two, that the consent to search was voluntary because the respondent was in custoday at the time. So on each of those two points, they failed to carry their

burden.

QUESTION: Well, did the district court suppress or not?

MR. NASATIR: The district court did not suppress the evidence.

QUESTION: So the district court found in favor of the Government.

MR. NASATIR: That is correct.

Of course, the district court didn't have the benefit of the Schneckloth decision at that time, it didn't have the benefit of the Brown decision at that time, and it didn't have the benefit of some of the later cases which has clarified this Court's thinking on that very issue. And I think the district court erroneously, and I think even the court of appeals erroneously considered that this was a probable cause arrest and the probable cause was sufficient. But, of course, that was decided against us and although we assert it as an alternative ground, that is not our primary issues.

What I would like to make clear to the Court today is what is the issue in this case and what was the decision of the court of appeals of the Ninth Circuit. The Ninth Circuit did not establish a per se rule as to all situations that an arrest warrant, if you had time to get one, you must obtain one, or the police must obtain one. What the court of appeals did was said in this particular situation where Inspector Barbarick

waited six days, where there was time to get a warrant and where the prosecution in carrying its burden could not point to one exigent circumstance where a warrant would be excused, that in this particular case a warrant is not excused, and a warrant was necessary.

QUESTION: What do you do about the Government's position that it was exigent at the time that he was committing the last crime?

MR. NASATIR: It might have been exigent at the time he was committing the last crime.

QUESTION: As a matter of fact, he wasn't convicted on the first one at all.

MR. NASATIR: That is correct. But that, of course, was later. And I think --

QUESTION: You don't see any significance in it?

MR. NASATIR: I don't see any significance because the officer at the scene didn't see any significance in that. Obviously what happened here is the officer at the scene did not trust his own informant, especially when he found out after he searched --

QUESTION: And then when he saw the crime committed in his presence --

MR. NASATIR: He didn't see a crime committed in his presence, your Honor.

QUESTION: Yes, he did.

MR. NASATIR: The only thing he saw was --

QUESTION: He saw the possession.

MR. NASATIR: All he saw in his presence was a cigarette being lighted. As soon as he started to validate --

QUESTION: What did the cigarette being lit mean?

MR. NASATIR: That the respondent was in possession of stolen credit cards.

QUESTION: Which is a crime.

MR. NASATIR: Which is a crime. But, your Honor, as soon as he patted down the respondent he found out that he didn't have credit cards, and obviously since he said that the only reason he arrested the respondent was because of that lit cigarette -- I mean, was because of the prior crime, he didn't even trust the lit cigarette. And I think this is important.

QUESTION: Were the credit cards in the car in his possession?

MR. NASATIR: The credit cards were in his car.

QUESTION: Was that in his possession?

MR. NASATIR: The court found they were in his constructive possession, yes, your Honor. But what Inspector Barbarick -- and this I think is crucial -- when he saw that lit cigarette, he didn't trust that lit cigarette. He didn't feel that there was a new crime being committed or he would have arrested on probable cause for that new crime which he had an

absolute right to do. There was a crime being committed in his presence, there is a reasonable possibility of escape. But what he did, he relied on a crime that was committed six days ago. And I think this issue is important because of the straw man which the Solicitor General has set up in this case. He said all the deleterious effects that a warrant would have. He said that a warrant would encourage an investigation of -- that no one would leave the police free to conduct a further investigation and to collect more evidence to be sure that they had the right man, that they could collect more information and be sure that they could corroborate the informant. That they could collect more information so that they could clear innocent people.

But on these facts you can see what human nature is, and I think you can see the reason why the Fourth Amendment and all case law has required warrants in these situations where a policeman has time to reflect.

QUESTION: You say all cases have required warrants in these situations? Were you talking about an arrest and not a search?

MR. NASATIR: That's correct, your Honor.

QUESTION: Any case from this Court?

MR. NASATIR: Well, I can cite the Fourth Amendment.

QUESTION: No, you said cases. What cases from this Court are you talking about?

MR. NASATIR: The cases from this Court are the

Rabinowitz case, the Trupiano case, the Brown case, all of the cases which --

QUESTION: Those are searches.

MR. NASATIR: Absolutely searches. But are we going to say that a search of items, of objects, are more of an intrusion on a person's privacy, which I think anyone will admit the Fourth Amendment is designed to protect, are they more of an intrusion on a person's privacy than a seizure of that person himself?

QUESTION: Supposing you get back to answering my question, which was about the cases that you said a moment ago held that a warrant was required for arrest.

MR. NASATIR: A warrant is required where there are no --

QUESTION: What cases are those?

MR. NASATIR: Your Honor, there are no cases --

QUESTION: You said a minute ago that all the cases held that.

MR. NASATIR: All of the cases hold that in a search and seizure situation --

QUESTION: You didn't qualify it that way when you said it.

MR. NASATIR: Your Honor, an arrest is a seizure of a person. That's all it is. The only thing an arrest is.

QUESTION: But there have been numerous cases from

this court that hold probable cause is sufficient for an arrest of a person, haven't there?

MR. NASATIR: There have been probable cause where there are exigent circumstances, certainly. And in every case where they have held that an arrest is proper, there have been exigent circumstances.

Now, in a couple of cases --

QUESTION: What are those cases.

MR. NASATIR: In Trupiano, for example, the officer saw an ongoing crime committed exactly in their presence which is a situation that Mr. Justice Marshall spoke about, a crime being committed in their presence, which they had a perfect right to stop and to arrest the person without a warrant even when he was on his premises. They looked through that window, they saw the man operating a still.

QUESTION: I'm familiar with that case.

MR. NASATIR: They had a search warrant in that case and they presented the facts as to probable cause.

QUESTION: There have been many cases in which the validity of the arrest has been assumed.

MR. NASATIR: Exactly, your Honor. And Mr. Justice White in a dissent, and I don't have the case to cite to you at the present time, but in a dissent he says that really it has been assumed that arrests have been made with exigent circumstances because in actuality this is an unusual case.

In most cases in arrest situation, there are exigent circumstances which exist. Exigent circumstances apply to movable objects, and what is more movable than a human being? But in this case there wasn't a movable human being. In this case the officer knew he could get ahold of Mr. Watson. He in fact set up a meeting where he knew Mr. Watson would show up, which Mr. Watson did. He had control over Mr. Watson. He didn't rely upon a crime that was being committed in his presence; he relied upon facts that occurred six days prior to this.

QUESTION: How did he know that he was going to be present except that he was invited or that the appointment had been made?

MR. NASATIR: Well, certainly he didn't know. But obviously when Mr. Watson showed up.

QUESTION: He didn't know, then.

MR. NASATIR: He had the feeling, and when Mr. Watson showed up, his feeling was confirmed. There was no danger of Mr. Watson escaping. You see, your Honor, what has happened in this case and this case alone is that the prosecution just failed to carry its burden. If they had asked Mr. Barbarick or if Mr. Barbarick had really felt that he was arresting for an ongoing crime, he should have said so. If Mr. Barbarick had felt that there was danger of escape of Mr. Watson, he could have said so. If Mr. Barbarick had felt that he was protecting the safety of property or other persons and

he had to do that by arresting Mr. Watson, he could have said so. He never said so. What he did say was he arrested him for a crime that was six days old. What he didn't do are all of the things that the Solicitor General says an investigator will do if he is given the time to reflect. He didn't check out his informant; he didn't look for fingerprints on the credit card; he didn't look for the innocence of Mr. Watson; he didn't try any other investigative techniques. He sat back and tried to set up a situation where he caught Mr. Watson "dirty" with other credit cards.

But then when he saw the signal from his own informant, obviously he didn't trust that and relied upon a situation which was six days old.

We are not talking about time in this case, time only. What we are talking about is an opportunity to obtain a warrant without exigent circumstances.

QUESTION: Do I understand you that if he said,"I am arresting you for having a credit card in your possession as of this time," everything would be all right?

MR. NASATIR: I wouldn't concede that there would be probable cause in that situation, your Honor, but I would concede that that would be an exigent circumstance if there was probable cause.

QUESTION: So the only problem is he didn't say that.

MR. NASATIR: No. The only problem is he didn't

rely on his informant. He relied upon a situation which was days old.

Now, he could have said he thought Mr. Watson was going to escape. But he didn't. Obviously he didn't think so or he would have said so. And he could have said any of the other things. But obviously he didn't think so.

This Court has said many times that we want to involve the judiciary and magistrates in our machinery for search and seizure.

QUESTION: If everything is so obvious -- do you really mean that?

MR. NASATIR: In the decisions that I've read in this Court, I think, your Honor, that every Justice sitting on the Court has said that we want to encourage warrants, we want to encourage involvement of the judiciary in arrest situations, we want to interpose a magistrate's detached opinion between the officer who is actively involved in ferreting out crime and whose ego and everything in his personality is involved, we want to interpose a neutral, detached magistrate to help him out, to see if he has probable cause, to confirm probable cause, and to issue a legal process so that a person can be arrested. In many arrest situations, and the reason why this litigation has not reached this Court is because usually in an arrest situation it's an easy burden for the prosecution to carry. And as Mr. Justice White said in the dissent I spoke

about, it hasn't been litigated because people assume exigent circumstances in most arrest situations.

But what you have here are no exigent circumstances. And what you have here is this is maybe the one case where you hearken back to the Fourth Amendment and you say that the seizure of a person is more important, or at least just as important, as the seizure of an object. You see, Coolidge would mean -- if we were to require a warrant to arrest a body, a person, to deprive a person of his liberty, we could say, well, you can't seize the car in Coolidge because there is no warrant but you sure could seize the driver if he was sitting behind the wheel, which seems to me incongruous, and I don't think that this Court ever meant to differentiate between searches and seizures.

And why, we must ask ourselves, does the Solicitor General place so much emphasis on an arrest on private property? Once again, do we extol private property or possessions over the actual person, over the actual liberty of the human being?

QUESTION: Well, certainly, one reason for distinguishing private property is that is the fact situation which was deemed important in Coolidge as to the situs of the car.

MR. NASATIR: Right. And the only reason that it was deemed important in Coolidge, and the only reason private property is deemed important in any situation, as the Katz

case makes clear, your Honor, is because of the interest that people have in their property and in that privacy. There is no -- if nobody was involved, if no person was involved in that private property situation in Coolidge, we wouldn't care about it, we wouldn't be worried about it. So when the person is --

QUESTION: What do you mean if no person were involved in that -- you mean that there had been nobody at home it would have been perfectly all right to search the home?

MR. NASATIR: No. If no one owned that car, like an abandoned car, if it was an abandoned car. If no one had an interest in it. If no one owned that home or lived there. A home is only a shell around a body. Katz made clear that what you are talking about when you are talking about the protection of privacy and property is the person who owns it, who has an interest in it. Those are our reasons for standing, those are our reasons for the protection of the judiciary in these situations at all, is that person.

The difference between this situation and why it hasn't been brought up in many cases before this Court is because usually the police have an excuse, a justification for arresting a person --

QUESTION: Where do you get your authority for these broad statements that what police usually do? Right out of the thin blue.

MR. NASATIR: No. The only authority that I have is

Mr. Chief Justice White's statement that this has never been litigated because people -- or not litigated much is because people assume that there are exigent circumstances and --

QUESTION: Why don't you cite that instead of bringing it out of the air. Why don't you cite the case rule that the usual rule is that a police officer may arrest without a warrant when believed by the officer upon reasonable cause to have been guilty of a felony.

MR. NASATIR: Certainly that's the usual rule, but there must be exigent circumstances.

QUESTION: I don't see any exigent circumstances in what I just quoted to you. You will find that in Carroll v. United States.

MR. NASATIR: In Carroll v. United States.

QUESTION: Yes.

MR. NASATIR: Certainly in Carroll v. United States, but you will also find exigent circumstances in Carroll v. United States.

QUESTION: But it's not in that phrase, is it?

MR. NASATIR: It's not in that phrase, but that's what Carroll is all about, the moving vehicle.

QUESTION: I see.

MR. NASATIR: And that's what Carroll has been cited for in many, many years, is the moving vehicle and exigent circumstances.

QUESTION: But that is the usual rule. The usual rule doesn't have exigent circumstances in it.

MR. NASATIR: But the case did. And the usual case has exigent circumstances.

QUESTION: The usual facts.

MR. NASATIR: The usual facts do.

QUESTION: You want to tell us that where a man is committing a crime that exigent circumstances have got to be shown?

MR. NASATIR: Not where a man is committing a crime in the officer's presence. Obviously the officer has --

QUESTION: Wasn't he possessing a credit card illegally in the officer's presence?

MR. NASATIR: He was. That's what the informant's signal meant to the officer. That's correct. But the officer didn't believe it, your Honor.

QUESTION: But the officer moved on that.

MR. NASATIR: He didn't move on that. What he moved on was the situation that arose six days earlier, the past crime.

QUESTION: And that was what? What was that crime?

MR. NASATIR: That crime was possession of stolen there also. But that was a different crime. What he tried to do was set up a new crime. What happened was he wasn't sure.

If you allow this type of situation, your Honor, you

allow a situation which -- and what I want to get to now is the consent, where a person can be arrested and his consent can be obtained.

QUESTION: I would like to hear you on the consent point.

MR. NASATIR: And I'd like to talk to you about it, your Honor.

Your Honor, in this type of situation, since the officer did not find the credit cards on the person or did not believe his informant's signal, obviously what he wanted to do is set up a situation where he could arrest Mr. Watson with the credit cards on him. He patted him down, he searched him, he didn't have the credit cards. Then he advised him of his Miranda rights immediately after taking him out of the restaurant, and the reason he took him out, I think, is important, that things were getting excited in the restaurant, that things were getting confused in the restaurant, that it was a confusing, exciting situation.

QUESTION: Why do you say that he did not believe the informant when the informant lit a cigarette?

MR. NASATIR: Because he didn't rely on it. He relied on the information that he had received six days earlier.

QUESTION: But it was that that triggered his approach to the respondent, wasn't it, and the arrest?

MR. NASATIR: Not the arrest, your Honor. The arrest was triggered because of the past crime that the officer had.

QUESTION: Why do you say that?

MR. NASATIR: That's what the officer said on the stand. That's what the prosecution in attempting to carry their burden in this case said. This comes from the prosecution's evidence, not that of the respondent.

QUESTION: Um-hmm. But there was arranged -- it was predetermined that the signal should be lighting the cigarette.

MR. NASATIR: That is correct.

QUESTION: And when the cigarette was lighted is when the officer approached the respondent and arrested him.

MR. NASATIR: That is correct.

QUESTION: The objective facts would seem to indicate that what triggered the arrest was the signal, the prearranged signal.

MR. NASATIR: That triggered the approach, your Honor. What triggered the arrest, according to the officer's own testimony, was that prior crime and not the signal. And I think there's a distinction between the approach of the person and the arrest.

QUESTION: The signal was entirely irrelevant.

MR. NASATIR: The signal only pointed in time the

approach of the officer, that's correct. That is correct.

I think relevant to this issue, by the way, is the fact that the officer in these six days never attempted to corroborate his informant in any way. He had a handwriting exemplary of my client, the respondent. He had fingerprint exemplars of my client. He never corroborated that his fingerprints were on the credit card or that his handwriting was on the list that was given to him by his informant.

QUESTION: It assumes that after various people had handled the credit card, the fingerprints of the first man would still be discernible, doesn't it?

MR. NASATIR: Yes, it does.

QUESTION: Is it very likely?

MR. NASATIR: It's possible.

QUESTION: The credit card had been handled by first the informant, then by the detectives, plus other people.

MR. NASATIR: In careful police work the detective wouldn't have handled it, of course, so it would have just been handled -- if the informant's facts were true, it would have just been handled by the informant and the respondent. So that the fingerprints still would have been there if Inspector Barbarick had used those six days to check those facts out.

In the consent situation he was placed in custody, handcuffs were placed upon him, he was given his Miranda rights.

His Miranda rights, of course, do nothing to vindicate his Fourth Amendment rights, as was made clear by Brown. So the first analysis I think is if you hold that the arrest was illegal because of the failure to obtain a warrant in this unusual circumstances, or because the prosecution failed to carry its burden of showing exigent circumstances to excuse that warrant, then it's certain under these facts that this was the fruit of that illegal arrest. There was very few minutes in between the arrest and the consent, there was clearly no warning that would attenuate the taint that was --

QUESTION: What was it that he said to the police when he said, "Can I search your car?" What exactly did your client say?

MR. NASATIR: My client said yes.

QUESTION: That is not consent?

MR. NASATIR: That is consent, your Honor, but is it voluntary?

QUESTION: After he said, "Whatever we find may be used against you," is that correct?

MR. NASATIR: That's correct.

QUESTION: And being told that, after the Miranda warning, he said, "Go right ahead."

MR. NASATIR: That's correct.

QUESTION: That does not add up to consent?

MR. NASATIR: Not to my mind, not in this situation.

QUESTION: Well, what would you need for consent, an affidavit?

MR. NASATIR: No, what you would need for consent is a specific warning. Mr. Watson --

QUESTION: I thought the warning was he was going to use what we find in the car.

MR. NASATIR: That was the warning about what would be done with it, but there was no warning of his right to refuse. The fact of it being used against him does not indicate that he had a right to refuse. And it's always intriguing in the Miranda situation that you tell a person that he doesn't have to talk to you and then you immediately start asking him questions. Now, what is he to assume from that? Is he to assume that he has a right to refuse from the fact that you tell him you don't have to talk to me and then you immediately ask him questions? And also, your Honor, I think he should --

QUESTION: This is different from Miranda. This man says specifically, "Whatever I find in that car, I am going to use."

MR. NASATIR: That is right.

QUESTION: And he said, despite that, "Go ahead and take it and use it." That's what in substance he said.

MR. NASATIR: But he never said, "You have the right under the Constitution not to let me go in there. I will use

it against you, but you have the right not to let me go in there." If Inspector Barbarick really wanted to be fair in this case to Mr. Watson and really wanted -- in your dissent in Brown, your Honor, you stated --

QUESTION: That was a dissent.

MR. NASATIR: No question about it, but I think you correctly stated --

QUESTION: Aren't you in dissent now?

MR. NASATIR: Excuse me?

QUESTION: You're in dissent now.

MR. NASATIR: No. No.

QUESTION: You are talking against cases that this Court has decided.

MR. NASATIR: No, I am just talking in favor of a principle that an informed choice must necessarily be made by a person who is aware of his choices.

QUESTION: In my dissent the man didn't say that we were going to use it, that's what I dissented about, that he should have told him he was going to use it. And in this case he did tell him. So that takes that dissent out of your picture. Right?

MR. NASATIR: No, because I think telling a man that you're going to use it is different from telling him that he has the right to prevent you from getting it in the first place. And I think there is a significant difference

in that, your Honor.

But there is three analysis -- and what the court of appeals did in the case below in that totality of circumstances -- first, it can be analyzed under the "fruits" doctrine, as stated in Brown, to protect the Fourth Amendment rights. But to protect the Fifth Amendment rights involved in this case, what the court of appeals did is consider both sides of the coin, which is, I think, the correct analysis under this Court's opinion. They considered the effect of the possible coercion on the respondent; they also considered the police conduct.

QUESTION: You say to protect the Fifth Amendment rights; do you mean the privilege against self-incrimination?

MR. NASATIR: Privilege against self-incrimination and the right to due process.

QUESTION: Oh, I didn't realize that was involved here.

MR. NASATIR: I think it is involved here. It's a custody situation, it's a situation where the police had in effect extracted the words "I consent" from my client. Under that situation, it is a Fifth Amendment analysis.

QUESTION: You mean when he said, "I consent," he's incriminated himself?

MR. NASATIR: Under that analysis, yes. And also --

QUESTION: Under that analysis, yes, but under any

other analysis that has ever been supported by any judicial decision?

MR. NASATIR: I think under the Katz decision, your Honor, where they say that an intercepted conversation is the same as an intercepted --

QUESTION: But that's a Fourth Amendment case.

MR. NASATIR: That is a Fourth Amendment case.

QUESTION: Well, I thought you said that if the police officer says to your client, "Will you let me go in your car," and he says, "Yes, I will," that his statement, "Yes, I will," incriminates himself.

MR. NASATIR: It incriminates himself, but the main argument, of course is the Schneckloth voluntariness argument.

QUESTION: But tell me just why you think it incriminates him under our cases.

MR. NASATIR: Because it's a response where he doesn't have to give one tending to incriminate himself, leading to evidence that will incriminate himself by his own statement. When he says, "I consent," that allows the officer to get evidence from the automobile.

But also, your Honor, obviously the Fifth Amendment analysis goes to the voluntariness question. But what the court of appeals in this case was saying is that you can't ignore the situation which brought about the custody in determining the totality of the circumstances when you are

looking at the voluntariness question under the Fifth Amendment. And in not ignoring the situation which brought about the custody, they took a look at the police conduct as well as its effect on that person, and under that analysis, you can apply to the facts of any case, and certainly it's not a per se rule as to consent. It allows the court and courts in general to look at all the circumstances, including the situation which brought about the consent, as well as that situation's effect on the person and its voluntariness.

QUESTION: Mr. Nasatir, do you think this consent could have been exculpatory in the minds of your client? In other words, he seemed confident the police would find nothing. If the police found nothing, they would not have arrested him. I'd like a confession in that respect. Isn't it if one consents to a search, don't you think the chances are that he thinks nothing will be found that incriminates him?

MR. NASATIR: Mr. Justice Blackmun -- excuse me, Mr. Justice Powell.

QUESTION: I am complimented.

MR. NASATIR: I am sorry. My client was sitting down to dinner one minute and was arrested and handcuffed the next. He was then given rights which related to his right not to incriminate himself, and then immediately asked the question that led to his incrimination. Under those circumstances, certainly human beings react in a variety of different ways,

and one of those ways might be false bravado. Certainly the way that human beingsreact is not to look at the officer in the eye in stony silence which would be rude, which would be incongruous with a question. That's not the way human beings usually react. Sometimes some of them react as did Mr. Watson here, obviously, with false bravado rather than with informed awareness of his right to refuse to consent. If it had been certainly a lawyer under arrest or someone who was informed of his rights, he would have reflectively said, "I refuse to consent to a search of my automobile."

QUESTION: You are arguing that the Constitution requires a policeman to protect a man in this situation from what you call his urge to engage in false bravado.

MR. NASATIR: Only to adequately inform him of his choices, your Honor. Only to make sure that he is aware of what his choices are and that one of those choices will result in his keeping the officer out of that automobile.

QUESTION: Of course, he had worked with the same inspector, hadn't he?

MR. NASATIR: He certainly had, your Honor.

QUESTION: So he knew a little bit about it. As a matter of fact, he said, "I know my rights," didn't he? Didn't he?

MR. NASATIR: Yes, in response --

QUESTION: "Don't bother, Frank, I know my rights."

MR. NASATIR: Obviously he didn't know about his right to consent.

QUESTION: He said so. He said, "I know them."

QUESTION: What's the basis for your making that statement that he didn't know about his rights?

MR. NASATIR: Because he allowed the officer to go into the car where he knew incriminating evidence was under -- the evidence in this case.

QUESTION: I thought you just described that as a false bravado a few minutes ago.

MR. NASATIR: It was false bravado.

QUESTION: It turned out to be false, which is perhaps he hoped they wouldn't look under the floor board.

MR. NASATIR: That's a possibility, your Honor, no question about it.

I think that this case shows the propriety and the reasons why warrants should be required. Without requiring warrants in a case such as this, there will never be an incentive for the police to get warrants in an arrest situation where warrants are required. Respondent admits the vast majority, vast majority, of arrest situations a warrant will not be required because exigent circumstances are present.

QUESTION: That is arrest in a public place.

MR. NASATIR: In a public place. No question about it. And I admit that. But not in this case. Not in this

case where the man waited six days and showed why warrant should be required, because he didn't try to corroborate his informant, he didn't investigate further, he didn't investigate to clear my client, he didn't do anything except try and set up a situation to get a new crime, which he didn't get in his own mind and he arrested for the old crime. Under those circumstances, the prosecution in this case did not carry its burden on either issue.

MR. CHIEF JUSTICE BURGHER: Do you have anything further, Mr. Frey?

REBUTTAL ARGUMENT OF ANDREW L. FREY

ON BEHALF OF THE PETITIONER

MR. FREY: One or two brief points, Mr. Chief Justice.

This flaw in the question of the basis for respondent's arrest, Inspector Barbarick never denied that he was arresting for the other purposes. He simply announced at the time he made the arrest and he testified at the suppression hearing that the arrest was made on the basis of the old credit card. Of course, at that point he hadn't yet found the other credit cards, which might explain why he was bacing it on the old credit card.

QUESTION: You don't test the validity of an arrest by what ultimately it turns up, any more than you do the search. Whether or not he had the credit cards has nothing to do with the reason he made the arrest.

MR. FREY: It wouldn't affect whether or not he had probable cause, but the point I want to make is that even if he subjectively believed he was arresting for the old credit card, the existence of probable cause with respect to the additional stolen credit cards would support the arrest. And there are several cases that hold that that I would like to call to the Court's attention in light of the argument that has been made.

In United States v. Martinez, a Second Circuit decision, 465 F.2d 79, and Ramirez v. Rodriguez, 467 F.2d 822, a Tenth Circuit decision, there are some others, but the point is there that the officer believes he is arresting for one offense for which he does not have probable cause but in fact the facts known to him gives him probable cause to arrest for a different offense, the arrest is lawful.

Similarly, if an officer is proceeding under a warrant which turns out to be invalid, the Court then looks to see whether probable cause existed for the arrest and, indeed, that was the analytical approach taken in the Coolidge case by this Court.

Now, also as a practical matter, the suggestion is that in the vast majority of cases this warrant requirement would not apply, because in most cases there would be a danger of escape or something of that sort. But, of course, there are holdings in the search and seizure area that exigent circumstances

at the moment you undertake the search may not be enough to support the search if you had an opportunity prior thereto to obtain a warrant. A case that comes immediately to mind is Vale v. Louisiana in which it was clear once Vale was arrested on the doorstep of his house that there were indeed exigent circumstances for searching his house. Yet the Court said that couldn't justify the failure to obtain a search warrant before going. So that the logic of respondent's principle would have a substantially broad impact and it's not just a very narrow, small category of cases that would be affected.

As for the desirability of getting the courts involved in this seems to me that that runs contrary to the Robinson case which recognized that there were certain principles in the law of arrest that were well established and that it was undesirable to disrupt those principles and to introduce a whole new realm of litigation.

Finally, on the false bravado point, the record shows that the search actually took 15 minutes before the envelope was found. It certainly was not obvious to Mr. Watson that the inspectors would find the envelope.

I have nothing further. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:58 a.m., argument in the above-entitled matter was concluded.]