People v. Brisendine: Search and Seizure in California

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I. INTRODUCTION

People v. Brisendine\(^1\) is a search and seizure case arising under art. I, sec. 13\(^2\) of the California Constitution. The case defines the authority for the permissible scope of a warrantless search of the person and effects of a suspect arrested for a minor non-vehicular offense.\(^3\)

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2. CAL. CONST. art. I, § 13 (former art. I, § 19) (West Supp. 1975) provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

3. See People v. Superior Court, 7 Cal. 3d 186, 101 Cal. Rptr. 837, 496 P.2d 1205 (1972) (hereinafter cited as Simon) for the Court’s holding on the permissible scope of a warrantless search of a suspect arrested for an ordinary vehicle violation. The Court’s reaffirmation of the holding in Simon that a search for weapons following a minor traffic arrest is impermissible unless there are specific, articulable facts or circumstances giving the arresting officer reasonable grounds to believe that the driver is in pos-
The Court addressed itself to two fundamental constitutional issues: First, the permissible scope of a warrantless search by law enforcement officers of the person and effects of a suspect arrested for a minor non-vehicular offense. Second, the effect that the California Supreme Court should give to the United States Supreme Court's recent decisions in United States v. Robinson and Gustafson v. Florida defining the permissible scope of a warrantless search of the person and effects of a suspect arrested for a minor vehicular offense under the Fourth Amendment.

The Court held that the permissible scope of a warrantless search of the person and effects of a suspect arrested for a minor non-

4. United States v. Robinson, 414 U.S. 218 (1973). Defendant Robinson was arrested for operating a vehicle after revocation of his operator's permit. A full field search of defendant at the scene of the arrest revealed fourteen gelatin capsules of heroin in a crumpled cigarette package in his coat pocket. The heroin was later admitted into evidence against defendant in a prosecution for possession of heroin. The Supreme Court held that in the case of a lawful custodial arrest a full search of the person was both an exception to the warrant requirement of the Fourth Amendment and also a reasonable search not violative of the proscription contained in the Fourth Amendment. Id. at 224-237. The Court distinguished Terry v. Ohio, 392 U.S. 1 (1968) on the ground that Terry did not involve a search incident to an arrest but a search incident to an investigatory stop based on less than probable cause to arrest. Id. at 233-35.

5. Gustafson v. Florida, 414 U.S. 260 (1973) is a companion case to United States v. Robinson, 414 U.S. 218 (1973), both decided on December 11, 1973. Defendant Gustafson was placed under custodial arrest for failure to have his operator's license on his possession. A full field search revealed marijuana inside an ordinary cigarette package in the defendant's pants pocket. The marijuana was subsequently admitted into evidence in a prosecution against defendant for possession. The Supreme Court upheld the search on the basis of its opinion in Robinson, supra note 4. The Court stated that no constitutional significance attached to the fact that the enforcement regulation did not require the defendant to be taken into custody. The Court held that the custodial arrest itself gave rise to the authority to search. Id. at 263-66.

The combined effect of Robinson and Gustafson is that one who has contraband or evidence of any crime on his person subjects himself to the risk that it can be validly seized if he is searched incident to a custodial arrest.

In addition to stating the applicable rule under the Fourth Amendment, Robinson and Gustafson have been judicially adopted to date in Indiana, Wisconsin, Oklahoma, and Missouri as a state standard. See People v. Brisendine, 13 Cal. 3d 528, 551, 119 Cal. Rptr. 315, 333, 531 P.2d 1099, 1117. See also, infra note 44.
vehicular offense where specific, articulable facts initially warrant a limited weapons search does not include a search into seeable commonplaces. The Court further held that the search in the instant case was violative of the State's "more exacting standard" under art. I, sec. 13 as construed by recent precedent and refused to adopt the federal "minimum standards" as defined in Robinson and Gustafson.

Because of the importance that attaches to the Court's independent stance in this area of criminal procedure, this note examines the development of the Court's opinion in the instant case in the context of the recent State and federal search and seizure case law.

II. FACTUAL BACKGROUND

On the night of June 3, 1970, two deputy sheriffs arrested defendant Brisendine and three other companions for having an open fire in a "high fire hazard area" of the San Bernardino National Forest in violation of a county fire ordinance.6

A short time prior to the Brisendine arrest, the same officers had arrested another camper in the vicinity for possession of marijuana. This camper had provided the officers with information regarding both the location and the existence of marijuana at the Brisendine camp.

At the time of the initial arrest of Brisendine and the other campers for the fire ordinance violation, the officers had no intention of placing the youths in custodial arrest. The officers did, however, desire to escort the defendant and his companions from their campsite because camping was prohibited at that location and because the officers had left their citation books in their vehicle. Defendant Brisendine and the other youths were without personal identification at the time of the arrest.

Prior to starting the journey back to the officers' vehicle, the two deputy sheriffs conducted a "lengthy and exhaustive" search of the persons and effects of the campers ostensibly for weapons. In the course of the weapons search, one officer picked up defendant Brisendine's knapsack, determined that it was too solid to ascertain if weapons were inside it and thereupon began a search into the interior of the knapsack. In the course of this search, the officer took from the knapsack and opened 1) an opaque, plastic bottle containing marijuana and 2) a number of envelopes containing dangerous drugs wrapped in tinfoil.

With the search ended and the contraband seized, the two officers then escorted the four campers, with all their personal effects, from the campsite to the patrol car. The officers allowed the campers to retain possession of a hunting knife and a camping hatchet during the journey. The journey was physically difficult, involving nighttime travel without a flashlight along ill-defined forest paths in a primitive surrounding. The defendant and companions made no attempt to obstruct or to delay the journey; nor did they make any attempt to escape.

Defendant Brisendine was charged with possession of marijuana and possession of a restricted dangerous drug; his motion to suppress evidence on the ground of illegal search and seizure was denied by the trial court. Following an unsuccessful petition for mandamus, the defendant was found guilty on both counts and placed on probation. The defendant appealed from an order granting probation, contending that the contraband was obtained by means of an unlawful search and seizure.

III. The Issue of Search and Seizure

The defendant’s threefold argument was that the search was either exploratory in nature, unjustified by the circumstances, or excessive in scope. Specifically, the defendant contended 1) that the search was exploratory for contraband rather than a search for weapons; 2) that there were no specific, articulable circumstances which reasonably warranted a weapons search in the first instance; and 3) that even assuming a limited weapons search was legal in the first instance, that the search as conducted exceeded its legitimate scope.

The Court rejected the defendant’s first two contentions, but concurred with his third argument.

A. The motivation for the search.

While the Court noted that there existed evidence upon which the trial court could have ruled that the weapons search was merely a facade to justify an exploratory search for narcotics, it refused to disturb the trial court’s implied finding that the search was for the purpose of discovering weapons and not contraband.\footnote{The Court noted, for example, that the officers acted upon the advice of an informant who suggested that the Brisendine camp possessed mari-}
B. The specific articulable circumstances authorizing the weapons search: An analogy to Simon.

The defendant's second contention was that even assuming that the search was not exploratory but was for weapons, the search was nonetheless illegal because the officers could not point to specific, articulable facts to initially justify such a weapons search.

The Court held that inasmuch as the intent of the officers prior to finding the contraband was to cite the defendant for his violation of the fire ordinance and to release him immediately thereafter that the instant situation was analogous to procedures followed under a minor vehicle arrest. The Court was faced with this fact situation in People v. Superior Court (hereinafter Simon). In Simon the same court held that the permissible scope of a search incident to an ordinary traffic arrest was conditioned upon three discernible categories created by the provisions of the vehicle and penal codes, as follows:

[Category One] Those who are merely cited and immediately released (Veh. Code, §§ 40500, 40504);

juana; that while the search for weapons was extensive, including examinations into the campers' gear, clothing and sleeping bags, the officers apparently took no precautions to guard themselves against clearly visible instrumentalities such as a hatchet and large rocks at the campsite; and that the officers allowed the youth to retain possession of a hunting knife and camping hatchet on the return journey. People v. Brisendine, 13 Cal. 3d 528, 535 notes 5, 6, and 7, 119 Cal. Rptr. 315, 318-319 notes 5, 6, and 7, 531 P.2d 1099, at 1102-3 notes 5, 6, and 7 (1975).

8. 7 Cal. 3d 186, 101 Cal. Rptr. 837, 496 P.2d 1205 (1972). Defendant Simon was arrested for operating a vehicle after dark without headlights or taillights. Defendant could produce neither a driver's license nor a registration for the vehicle. In the course of a field search of the defendant, the arresting officer took a small, plastic bag of marijuana from defendant's pants pocket. The Supreme Court upheld the trial court's order granting defendant's motion to suppress. The Supreme Court held that the search did not pertain to the arrest based on the traffic violation and that a search for weapons following a minor traffic arrest is impermissible unless there are specific, articulable facts or circumstances giving the arresting officer reasonable grounds to believe that the driver is in possession of a weapon.

9. CAL. VEHICLE CODE § 40500 (West 1966) provides:

Whenever a person is arrested for any violation of this code not declared to be a felony, or for a violation of an ordinance of a city or county relating to the traffic offenses and he is not immediately taken before a magistrate, as provided in this chapter, the arresting officer shall prepare in triplicate a written notice to appear in court or before a person authorized to receive a deposit of bail, containing the name and address of the person, the license number of his vehicle, if any, the name and address, when available, of the registered owner or lessee of the vehicle, the offense charged and the time and place when and where he shall appear. CAL. VEHICLE CODE § 40504 (West 1963) provides:

Delivery of notice

(a) The officer shall deliver one copy of the notice to appear to the arrested person and the arrested person in order to secure release must give his written promise to appear in court or before a person authorized to

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[Category Two] Those who may or must be taken before a magistrate and given the option to post bond (Veh. Code, §§ 40302, 40303); and,

[Category Three] Those who are arrested for felonies and booked according to the general Penal Code provisions on felony arrests (Veh. Code, § 403.01; Pen. Code, § 7, subd. (21)).

The Court detailed the permissible scope of search incident to each arrest as being:

receive a deposit of bail by signing two copies of the notice which shall be retained by the officer. Thereupon the arresting officer shall forthwith release the person arrested from custody.

(b) Any person who signs a written promise to appear with a false or fictitious name is guilty of a misdemeanor regardless of the disposition of the charge upon which he was originally arrested.

10. CAL. VEHICLE CODE § 40302 (West 1972) provides:

Mandatory appearance
Whenever any person is arrested for any violation of this code, not declared to be a felony, the arrested person shall be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the arrest is made in any of the following cases:

(a) When the person arrested fails to present his driver's license or other satisfactory evidence of his identity for examination.

(b) When the person arrested refuses to give his written promise to appear in court.

(c) When the person arrested demands an immediate appearance before a magistrate.

(d) When the person arrested is charged with violating Section 23102 misdemeanor drunk driving, or 23105 driving under influence of drug or addiction.

CAL. VEHICLE CODE § 40303 (West 1969) provides:

Optional appearance before a magistrate
Whenever any person is arrested for any of the following offenses and the arresting officer is not required to take the person without unnecessary delay before a magistrate, the arrested person shall, in the judgment of the arresting officer, either be given a 10 days' notice to appear as herein provided or be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the arrest is made.

11. CAL. VEHICLE CODE § 40301 (West 1959) provides:

Procedure.
Except as provided in this chapter, whenever a person is arrested for any violation of this code declared to be a felony, he shall be dealt with in like manner as upon arrest for the commission of any other felony.

CAL. PENAL CODE § 7, Subd. (21) (West 1968) provides:

To “book” signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest.
Category One—citation-release: Absent specific and articulable facts or circumstances, neither a pat-down nor a limited weapons search is permissible.

Category Two—magistrate-bond: A pat-down or limited weapons search is permissible.

Category Three—felony-booking: A pat-down or limited weapons search is permissible.\(^\text{12}\)

The Court noted that of the three categories listed, Brisendine could have been placed arguably under either the Category One—citation-release situation or the Category Two—magistrate-bond situation in regard to the fire ordinance violation. The Court held that in the instant case, the “exigencies of the situation” which required that the officers personally conduct the arrestees from the campsite to the officers’ vehicle, an act which necessitated the officers’ moving “in proximity with the arrestee[s]”, was a specific, articulable fact which justified a pat-down search for weapons “even though the charge would ultimately be disposed of by a mere citation.”\(^\text{13}\) Citing the balancing test language of the United States Supreme Court in *Terry v. Ohio*,\(^\text{14}\) the Court determined that the officers’ interest in protecting themselves during the transportation of the defendants from the primitive location in the nighttime outweighed the defendant’s interest in protecting his person and effects from a limited search.\(^\text{15}\)

C. Limitations on the scope of the permissible weapons search.

The defendant’s third and ultimately successful argument was that even assuming that the search for weapons was legal in its

\(12\) People v. Brisendine, 13 Cal. 3d 528, 536-37, 119 Cal. Rptr. 315, 320, 531 P.2d 1099, 1104 (1975).

\(13\) Id. at 536-37, 119 Cal. Rptr. at 320, 531 P.2d at 1104 (1975).

\(14\) 392 U.S. 1 (1968). The Court quotes at 20-21, “[There is] no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”

Defendant was stopped and frisked and a revolver was seized from him by an officer who had observed defendant and two other men’s unusual conduct which the experienced officer concluded was in contemplation of a daylight robbery. The Supreme Court upheld the State of Ohio’s dismissal of defendant’s motion to suppress, holding that the search was reasonable under the Fourth Amendment where the officer could reasonably conclude that criminal activity was “afoot” and that the person with whom he was dealing might be armed. The Court limited the scope of the search, however, to a pat-down (commonly called the Terry-type search) of the outer clothing of the suspect for concealed instruments that might be used for an assault. Id. at 30-31.

\(15\) The Court stated that it was incumbent upon the officers to escort the campers and their effects from the campsite because their presence at the location constituted the offense charged. People v. Brisendine, 13 Cal. 3d 528, 541, 119 Cal. Rptr. 315, 323, 531 P.2d 1099, 1107 (1975).
inception, the search as conducted nevertheless exceeded its permissible scope.

In discussing the permissible scope of the weapons search, the Court quoted with favor both the limitation language and the balancing test language of the United States Supreme Court in *Terry v. Ohio* (1968). The Court noted that in the limitation language, *Terry* recognized that "a search which is reasonable in its inception may violate the Fourth Amendment by reason of its intolerable intensity and scope." The inception-scope dichotomy in a search situation demands a twofold determination by the reviewing court:

[1 W]ether the officer's action was justified at its inception, and
[2] whether it was reasonably limited in scope to the circumstances which justified the interference in the first place. (Emphasis added.)

Using the limitation and balancing rationales of *Terry* as an approved guide, the Court held that this dual-prong "inception-scope" test must therefore be applied to the three distinguishable stages of the instant search: 1) the search of the person and the effects of Brisendine, including the knapsack; 2) the search of the interior knapsack; and 3) the search into the opaque, plastic bottle and into the envelopes.

1. The search of the person and effects, including the knapsack.

Defendant Brisendine raised no issue as to the search of his person.

In support of the search of the knapsack, the People cited *Chimel v. California* (1969) for the proposition that the officers could search the area within the reach of the defendants. While the Court noted that the testimony left in doubt whether the knapsack was actually within the reach of any of the campers, the Court

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17. Id. at 17-18.
18. Id. at 20.
19. Chimel v. California, 395 U.S. 752 (1969). The Supreme Court held that an arresting officer without a search warrant may search not only the arrestee but also the area "within the immediate control" of the arrestee from which he might gain possession of a weapon or destructible evidence. Id. at 762-63, 756-66.
concluded that Chimel was not dispositive of the case in any event.\textsuperscript{20}

The People recognized that under the Simon rule that in a situation of a Category One—citation-release traffic violation, to which the instant fire ordinance violation was analogized, the officer must point to specific facts or circumstances giving the officer "reasonable grounds to believe that weapons are present."\textsuperscript{21} This Simon hurdle had been passed by the exigent circumstances of the transportation of the arrestees which was viewed as a specific, articulable fact sufficient to authorize the pat-down.

The Court stated that the traditional rationale of warrantless searches incident to arrests was twofold: 1) the need to uncover evidence of the crime, and 2) the need to uncover weapons which might be used to injury the officer or to effect an escape.\textsuperscript{22} The Court held that the first rationale for the uncovering of evidence in the instant case was without merit because there could be neither "instrumentalities" nor "fruits" of the offense of maintaining a fire in "high fire hazard area."\textsuperscript{23} However, the second rationale for the search for weapons in the instant case stood on another and more secure footing and was satisfied. Under the existing circumstances of the nighttime arrest in a primitive area requiring the transportation of the arrestees from the area, the Court concluded that a "prudent officer" would have cause for a weapons search.\textsuperscript{24}

Thus, a search of the personal effects of the arrestees for weapons was justified even under Simon without a need to determine the justification under Chimel.

2. The search into the interior of the knapsack.

As to the search into the effects of the arrestees, namely the knapsack, the Court, citing the balancing language of Terry held that the intrusion of the pat-down of the knapsack was a relatively minor intrusion when compared to the risk of danger to the officers who would have to accompany the campers carrying the knapsack from the area.

The Court stated that the sole justification for a search, in the limitation language of Terry, is

\textsuperscript{20} People v. Brisendine, 13 Cal. 3d 528, 539 note 10, 119 Cal. Rptr. 325, 321 note 10, 531 P.2d 1099, 1105 note 10 (1975).
\textsuperscript{21} Id. at 538, 119 Cal. Rptr. at 321, 531 P.2d at 1105 (1975).
\textsuperscript{22} Id. at 539, 119 Cal. Rptr. at 321, 531 P.2d at 1105.
\textsuperscript{23} Id. at 539, 119 Cal. Rptr. at 322, 531 P.2d at 1106.
\textsuperscript{24} Id. at 540, 119 Cal. Rptr. at 322, 531 P.2d at 1106.
the protection of the police officer and others nearby, and it [the search] must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer.25

Since the officer in the instant case could not determine from a visual inspection and tactile pat-down of the knapsack if weapons were contained within the confines of the bag, the officer was justified in opening the knapsack to ascertain if such were contained therein.

3. The search into the bottle and into the envelopes: The "seeable" commonplaces rule of Brisendine.

In support of the validity of the search into the opaque, plastic bottle and into the envelopes, the People cited two exceptions to the warrantless search rule: 1) the plain view doctrine, and 2) the atypical weapons doctrine.

The Court held that the plain view doctrine was not applicable to the Brisendine situation as there was no contraband within the unobstructed view of the officer; the marijuana was veiled by an opaque, plastic bottle and the dangerous drugs were wrapped in tinfoil and encased in envelopes.26

The issue of whether the bottle and envelope could reasonably be suspected of being atypical weapons lead to the Court's expansion of the rule established in People v. Collins27 (1970) (hereinafter Collins) which states that:

26. The Court noted for comparison People v. Bock, 6 Cal. 3d 239, 103 Cal. Rptr. 281, 499 P.2d 961 (1971). In Bock the defendant was arrested at a party at which marijuana was present. The arresting officer, having reasonable cause to believe that other suspects might be in the house, searched the upstairs area where he observed a clear, plastic vial containing marijuana; the vial was located in an open jewelry case on the top of a dresser. The Supreme Court affirmed the trial court's denial of defendant's motion to suppress, holding that objects coming in plain view of an officer who has the right to be in a position to see them are subject to seizure without a warrant.
27. 1 Cal. 3d 658, 83 Cal. Rptr. 179, 463 P.2d 403 (1970). Police stopped defendant whose description matched that of a suspect in an auto theft. During a pat-down of the defendant for weapons, the officer felt a "little lump" in defendant's pants pocket. Over the protest of the defendant, the officer removed the object which proved to be a "lid" of marijuana in a plastic bag. The Supreme Court affirmed the trial court's order to suppress.
[A]n officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun, or club must be able to point to specific and articulable facts which reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down.28 (Emphasis added.)

The Court referred to People v. Mosher29 as a valid application of the Collins rule. In Mosher, a watchband which felt like a knife blade during a Terry-type search of a burglar was validly seized and was later admitted into evidence in a prosecution against the burglar for murder of the owner of the watchband.

The expansion of the Collins rule into the Brisendine rule is contained in the Court's statement that, "If such ordinary [commonplace] objects are not to be intruded upon when felt, a fortiori intrusion is unjustified when the commonplace is seen."30 (Emphasis in original.)

The Court held that the officers' search for weapons which was legal in its inception, being warranted by specific, articulable facts, became illegal when the officers' exceeded the scope of the limitation by continuing the search, which was now unwarranted by any specific, articulable facts, into the seeable commonplace plastic bottle and envelopes.

Emphasizing the limitation rationale of the United State Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968), the Court stated:

To permit officers to exceed the scope of a lawful pat-down whenever they feel a soft object by relying upon mere speculation that the object might be a razor blade concealed in a handkerchief, a 'sap', or any other atypical weapon would be to hold that possession of any object, including a wallet, invites a plenary search of an individual's person. Such a holding would render meaningless Terry's requirement that pat-downs be limited in scope absent articulable grounds for an additional intrusion.

Id., 1 Cal. 3d at 663, 83 Cal. Rptr. at 182, 463 P.2d at 406.

The Court also stated:

Terry v. Ohio, supra, reaffirmed the settled principles that 'a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope' and that the 'scope of the search must be strictly tied to and justified by' the circumstances which rendered its initiation possible.

Id., 1 Cal. 3d at 661, 83 Cal. Rptr. at 181, 463 P.2d at 405. Quoting 392 U.S. 1, 17-19.

28. Id., 1 Cal. 3d at 663, 83 Cal. Rptr. at 182, 463 P.2d at 406.

29. 1 Cal. 3d 379, 82 Cal. Rptr. 379, 461 P.2d 659 (1969). In Mosher, the Court had called attention to the need to distinguish among items by touch. The Court had noted the validity of making a distinction between that category of objects which, like the watchband, do feel like a "knife blade" and that category of objects which like "A box of matches, a plastic pouch, a pack of cigarettes, a wrapped sandwich, a container of pills, a wallet, coins, folded papers, and many other smaller items . . . do not ordinarily feel like weapons." (Emphasis added.)

IV. "A more exacting standard": California rejects the federal "Minimum Standard" of Robinson and Gustafson

The pivotal issue in Brisendine was the effect that the California Supreme Court should give to the United States Supreme Court's decisions in United States v. Robinson31 (1973) and Gustafson v. Florida32 (1973). Under either of these cases, which the People advanced as controlling in the Brisendine situation, the contraband taken during the search into the bottle and into the envelopes in the defendant's knapsack would have been validly seized pursuant to a legal custodial arrest for violation of the fire ordinance.

In giving these decisions the weight of an authority which the Court was free, but not compelled, to adopt, the Court noted that the search and seizure issue was decided under art. I, sec. 13 of the California Constitution "which requires a more exacting standard for cases arising within this state."33 The Court thus rejected


In rejecting the "minimum standards" of the federal cases, the Court affirmed its holding in Collins, 1 Cal. 3d 658, 83 Cal. Rptr. 179, 463 P.2d 403 (1970), supra, note 27, and stated that in California under the Robinson, 414 U.S. 218 (1973), supra, note 4 situation of a minor vehicle arrest for driving on a revoked license only a pat-down of the arrestee would be allowed prior to transporting the arrestee in a patrol car. The Court cited CAL. VEICLE CODE § 40303, subd. (b) which provides that an arrestee for the violation of driving a vehicle with a revoked license may be taken before a magistrate and allowed to post bail. The rationale for the California Court's limitation is that in a warrantless search situation involving a minor traffic violation, the search is made by the officer for his protection in order to determine if the arrestee is armed. The search is not made in order to discover the "fruits" or "instrumentalities" of the traffic offense because none exist; the act is the violation. With this analogy in mind, the Court held that there could likewise be no warrantless search for the "fruits" or "instrumentalities" of a fire ordinance violation: Again, it was the very act of being in the area and of having the campfire that constituted the citable offense.

The California Court, however, readily admitted that the United States Supreme Court held a different view. Indeed, the latter judicial body has held that an arrest based upon probable cause satisfies the Fourth Amendment proscription against unreasonable searches and seizures and "that an intrusion being lawful, a search incident to the arrest requires no additional justification" because "an individual subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person." United States v. Robinson, 414 U.S. 218, 237 (1973).
the "minimum standard" applicable to situations under the Fourth Amendment. In reaching this decision, the Court stated that it was unable to accept as valid the analysis presented by the Supreme Court of the United States in the Robinson and Gustafson decisions.84

Having rejected the federal standard, the Court proceeded to justify its power to establish a higher standard by invoking the doctrine of federalism85 with accompanying references to state and federal cases recognizing the validity of such state-federal divergences,86 including the more demanding California standards in the

The California Court challenged this view and referred to its holdings in Simon, 7 Cal. 3d 186, 101 Cal. Rptr. 837, 496 P.2d 1205 (1972).

34. The California Court candidly admitted that, given the same factual situation as presented in Robinson, it would reach the opposite result that the United States Supreme Court reached. The Court's analysis of the Robinson holding diagnoses the problem in the following manner:

That opinion proceeds from the premise that "It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment." (414 U.S. at p. 224.) It then recites that "The justification or reason for the authority to search... rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence..." (Id. at 234.) While based upon this need, however, "The authority to search... does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." Thus "[H]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it..." (Id. at p. 236.)

We have no quarrel with the proposition that a search incident to an arrest is a traditional exception to the necessity to obtain a warrant, nor with the concept that a portion of its justification is the need to uncover weapons. We also accept the view that transportation in a police vehicle per se justifies a limited weapons search, regardless of the likelihood that a particular arrestee is armed. However, we have examined the Robinson opinion at length and remain unable to determine how the final conclusion flows from these premises. Rather, the converse would seem to be true: having in the course of a lawful weapons search come upon a crumpled cigarette package, the officer would have no reasonable ground to inspect it. Our decisions have invariably required articulable grounds to inspect, and we decline the invitation of the People to abrogate that long-established principle today.


35. By basing its holding "exclusively" on art. I, sec. 13 of the California Constitution, the Court precluded the potential issue of construing the scope of the proscriptions under the Fourth Amendment.

36. The Court noted that the United States Supreme Court had affirmed the rule that the states are the ultimate arbiters of state law and that the California judiciary had on previous occasions acknowledged that right. Cf. Cooper v. California, 386 U.S. 58, 62 (1967). In Cooper, the Court, in dictum, stated, "Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it choose to do so." People v. Brisendine, 13 Cal. 3d 528, 548, 119 Cal. Rptr. 315, 531 P.2d 1099, 1111-12. Buttressing its federalism argument, the Court stated that the California Constitution is a "document of independent force" and

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area of double jeopardy and the exclusion rule. The Court also cited the historical development of the federal government's adoption of the provisions of the Bill of Rights from the charters of the colonial states and not vice versa. Additionally, the Court referred to the adoption of higher standards than the Robinson and Gustafson standard by recent judicial decision in two states.

— that the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens.  
Id. at 551, 119 Cal. Rptr. at 329-30, 531 P.2d at 1113-14. Additionally, the Court cited the recent passage of art. I, sec. 24 of the California Constitution which provides: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” Id. at 551, 119 Cal. Rptr. at 330, 531 P.2d at 1114.

37. See Curry v. Superior Court, 2 Cal. 3d 707, 87 Cal. Rptr. 361, 366, 470 P.2d 345 (1970), rejecting the federal rule of Gori v. United States, 367 U.S. 364, 369 (1961) that the Fifth Amendment proscription against double jeopardy is not violated when defendant is retried after the court has granted a mistrial without the defendant's consent but in his interest and affirming a dismissal under the same circumstances in state prosecutions. People v. Brisendine, 13 Cal. 3d 528, 549 note 17, 119 Cal. Rptr. 315, 328-329 note 17, 531 P.2d 1099, 1112-13 note 17 (1975).

38. See People v. Martin, 45 Cal. 2d 755, 759-761, 290 P.2d 855, 856-857 (1955). Cited by the Court at 13 Cal. 3d 528, 549, 119 Cal. Rptr. 315, 328, 531 P.2d 1099, 1112 (1975). California is the only jurisdiction recognizing a vicarious application of the exclusionary rule so that a defendant may object to the admission of evidence obtained in violation of the rights of any other defendant.

39. The Court cites 1 Schwartz, The Bill Of Rights: A Document Of History (1971) [citations] for the proposition that the colonial revolutionary charters contained the provisions later adopted by the federal constitution as the Bill of Rights. This “lesson of history” was not lost on the Court which also noted that the California Court's decision regarding the exclusionary rule in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) came six years before the United States Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961) making the exclusionary rule binding on the states. 13 Cal. 3d 528, 549-50, 119 Cal. Rptr. 315, 328-29, 531 P.2d 1099, 1112-13.

40. These states are Hawaii and New York.

In State v. Kaluna, 55 Haw. 36, 520 P.2d 51 (1974), the Hawaii Supreme Court held violative of art. I, sec. 5 of the Hawaii Constitution the search of a suspect arrested for armed robbery which resulted in the seizure of dangerous drugs (Seconal) contained in folded tissue in the suspect's clothing. Underlying the Court's decision was its concern for the reasonableness of the search:

In our view, the right to be free from 'unreasonable' searches and seizures under article I, section 5 of the Hawaii Constitution is enforceable by a rule of reason which requires that governmental intrusion into the personal privacy of citizens of this state be no greater in intensity than absolutely necessary under the circumstances.
V. The Dissent

The dissent’s primary rebuttal to the majority's holding in *Brisendine* was a belief that art. I, sec. 13 of the California Constitution paralleled the Fourth Amendment not only in the form of language but in the substance of meaning such that the California Court should defer to the construction given the federal proscription by the United States Supreme Court in *Robinson* and *Gustafson*. Accordingly, the minority would have held that contraband was seized in a search incident to a lawful custodial arrest.41

The dissent acknowledged that a primary motivation for its position was a concern for the safety of the officer in an arrest situation. The dissenting opinion viewed the *Brisendine* holding as providing demonstrably less of a safeguard to enforcement officers under the state law than currently exists under federal law pursuant to the authority of the topical cases. Quoting with favor the rationale of the United States Supreme Court in *Robinson*, the dissent agreed that “The danger to the police officer flows from the fact of the arrest and its attendant proximity, stress, and uncertainty, and not from the grounds for the arrest.42” (Emphasis added.)

The dissent further argued that the *Terry* limitation on the scope of an investigatory pat-down search when based upon less than

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41. Contrary to the view adopted by the majority, the dissenting justices viewed the acts at the campsite and the duration of the return journey as constituting a custodial arrest.

probable cause should not be carried over into the situation involving a lawful custodial arrest.\textsuperscript{43}

As to the arguments raised by the issue of federalism, the dissent stated that the majority sought to avoid the impact of the Robinson and Gustafson decisions by invoking the doctrine. The opinion also noted that the Brisendine holding would result in a confusing dual state-federal set of standards for search and seizure. Furthermore, the dissent noted that the passage of art. I, sec. 24 did not necessitate nor should it require a construction to avoid application of a parallel federal constitutional provision such as the Fourth Amendment.

The dissent noted that while two states had adopted more restrictive standards than the federal standard, that four states\textsuperscript{44}

\begin{enumerate}
\item \textsuperscript{43} 13 Cal. 3d 528, 553-54, 119 Cal. Rptr. 315, 331-32, 531 P.2d 1099, 1115-16 (1975).
\item \textsuperscript{44} These states are Indiana, Missouri, Oklahoma, and Wisconsin.
\end{enumerate}

In Sizemore v. State, — Ind. App. —, 308 N.E.2d 400 (1974), officers observed the defendant erratically driving a vehicle which had a missing tail light. The officers arrested the defendant for operating a vehicle without proper lighting; but prior to making a formal arrest for driving under the influence and transporting him, the officers conducted a pat down which revealed a rolled cigarette of marijuana. Defendant's motion to suppress was denied by the Court with the following statement: "On the basis of the foregoing analysis, we conclude that the principles expressed in Robinson and Gustafson are directly applicable and dispositive of the search of Sizemore's person in the instant case." \textit{Id.} at —, 308 N.E.2d 400, 406.

In State v. Cromwell, 509 S.W.2d 144 (Mo. Ct. App. 1974), police officers stopped the defendant for running a traffic light. Upon the defendant's offering the police a driver's license which he admitted was not his own, the police arrested him for driving without a license. A search of the defendant's person resulted in the seizing of several .38 caliber cartridges. A subsequent search of the defendant's car revealed a .38 caliber revolver which had been taken from a security guard during the course of an armed robbery three days earlier. Defendant's motion to suppress the introduction of the revolver was denied. The Court held that these searches were incident to a lawful arrest upon the authority of the twin federal cases. \textit{Id.} at 146.

The Oklahoma decision, Hughes v. State, 522 P.2d 1331 (Okla. Crim. App. 1974) held that under the Oklahoma Constitution decisions by the United States Supreme Court bound the state judiciary. The defendant was arrested for reckless driving, handcuffed and placed in custody. A search of the defendant's person revealed dangerous drugs (codine pills). Defendant's motion to suppress the contraband was denied despite his protest that the pills were not the fruit of the crime of reckless driving. The Court held Article 3, §§ 1 and 3 of the Constitution of the State of Oklahoma made binding the holdings of Robinson and Gustafson on the state: "It is, there-
had adopted the federal standard defined in the Robinson and Gustafson.

In sum, the dissenting justices would follow Robinson and Gustafson and would overrule Simon and similar cases to the extent that the same are inconsistent with the recent federal decisions.

VI. CONCLUSION

People v. Brisendine, holding that the permissible scope of a warrantless search of person and effects of a suspect arrested for a minor non-vehicular offense where specific, articulable facts warrant a limited weapons search does not justify a search into seeable commonplaces, typifies the controversy in recent Fourth Amendment cases. The controversy of the protection that is to be afforded to the arresting officer and the protection that is to be afforded to the arrestee's integrity are matters that can never be put into absolute rules. As the Court states,

Once again we emphasize that in reviewing a warrantless search to determine the reasonableness of its breadth a court is ill-advised to apply hard and fast rules.\(^4\)

The Court in Brisendine has affirmed its traditional view that the ground for the arrest determines the scope of the search. The Court demands that the arresting officer point to specific articulable facts or circumstances justifying the weapons search in those arrests where such a search is not authorized on the basis of the arrest itself. In refusing to conform to the minimum standards set forth by the federal judiciary, the California Court has effectively shown that the tools of law enforcement must themselves conform to the law.

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fore, elementary that we must turn to the decisions of the Supreme Court of the United States in interpreting the Fourth Amendment of the Constitution in determining the legality of the search and seizure here involved, notwithstanding any prior decision of this Court." Id. at 1333.

In State v. Mabra, 61 Wis. 613, 213 N.W.2d 545 (1974) the defendant and defendant's wife were arrested for armed robbery of a tavern. A custodial search of the defendant's wife at the police station preparatory to incarceration and made to identify her personal belongings revealed $634, much of it in small change. The Court held that this money had been properly admitted into evidence at the trial because an article coming into an officer's possession in the course of a lawful search is admissible under the rationale of previous state cases and recent federal decisions. The Court summarized the effect of Robinson and Gustafson upon prior state cases in these words: "Our prior decisions requiring a reasonable search to be directed to the object or purpose of the arrest are no longer viable." Id. at 613, 213 N.W.2d 45. 13 Cal. 3d 528, 541, 119 Cal. Rptr. 315, 323, 531 P.2d 1099, 1107 (1975).