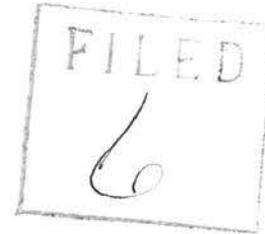


LIQUOR CONTROL ACT: Sec. 11, Art. 2, Constitution of Mo. has no application to a crime being committed in officer's presence; when peace officer has reason to believe that an automobile is being used to transport intoxicating liquors in violation of laws of Mo., his search and seizure of liquors without a search or other warrant is not a violation of Sec. 11, Art. 2, Constitution of Mo.

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April 24, 1934.



Mr. E. J. Becker,  
Supervisor of Liquor Control,  
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter requesting an opinion as to the following state of facts:

"There is a great amount of liquor being hauled across from the State of Illinois into the State of Missouri by trucks and private cars at various points along the river; St. Louis, Hannibal, Bowling Green, etc.

"The Prosecuting Attorney at Pike County called the other day and asked if he and the county authorities needed a search warrant in order to search private cars. In our telephone conversation with Mr. Hewitt we were advised unofficially that the county authorities, with the aid of the Highway Patrol, could stop all trucks and obtain information as to where the liquor was consigned in this state, but in regard to private cars Mr. Hewitt was of the opinion that the authorities, even with the aid of the Highway Patrol, could not search and seize, as he said this law had been repealed.

"Will you please give us an official opinion on this matter immediately, as the State is losing a vast amount of revenue, which it justly deserves."

I.

Section 11 of Article II of the Constitution of Missouri has no application to a crime being committed in the officer's presence.

Section 11 of Article II of the Constitution of Missouri provides:

"That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or things, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

Section 4511 of Chapter 31, R.S. Mo. 1929 pertaining to the prohibition of intoxicating liquors in the State of Missouri provides for the issuance of search warrants to enforcement officers; however, Chapter 31 was repealed by the Liquor Control Act of Missouri, Section 44, Laws of Mo. (extra session) 1933 and 1934, page 92, and no provision was made for the issuance of search warrants under the new Act.

The question now remaining is whether or not officers may search premises without a search warrant in order to apprehend people guilty of violating the Liquor Control Act of Missouri.

In the case of State v. Rhodes, 316 Mo. 571, the Court said (l.c. 574, 575):

"While we think the search warrant was void because it failed to describe the place to be searched as nearly as may be, as prescribed by Section 11, Art. 2, of our Constitution, yet the evidence sought to be suppressed was admissible on the theory that the sheriff named in the warrant as executor thereof, before he entered the home of Bill Rhodes, had reasonable grounds or probable cause to, and did suspect, that a felony was being committed therein. That the above rule is apposite is based on the testimony of the sheriff that he smelled liquor and mash before he knocked on the door and while he was ten or fifteen steps from the house on

the private road leading thereto. These facts or knowledge constituted reasonable grounds to suspect that a felony was taking place therein, causing, as we later show, his subsequent entry and that of his deputies to become lawful. That the crime was being committed vested the sheriff with authority to enter, justifying the entry and the arrest without warrant. (McBride v. United States, 287 Fed. 214, affirmed 284 Fed. 416, and certiorari denied, 261 U.S. 614.) That an officer may arrest on probable cause without warrant is shown in McKeon v. National Casualty Co., 216 Mo. App. 507, 270 S.W. 707."

\* \* \* \* \*

"While we are not unmindful of the provisions of the above section of the Constitution, nevertheless the situation here presented is not embraced within the terms of the section. It has always been adhered to under our form of procedure and theory of government that an officer of the law is clothed with ample authority to arrest a felon while the crime is being committed, and to that end may break and enter a home where he has reasonable grounds to suspect that a felony is then being committed."

The essence of the above doctrine is that a search without a warrant must be based upon probable cause, as well as one made with a warrant and that probable cause consists in a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty. *Bedell v. Nichols*, 316 Mo., l.c. 881.

It is fundamental that the right to search is incidental to lawful arrest. In the case of *State v. Rebasti*, 267 S.W. 858, the Court said (l.c. 860):

"Being lawfully arrested, the officers had a right to search him and his possessions in the room where he was arrested, and take from him any article which might be used in securing his conviction. *State v. Owen* (Mo. App.) 259 S.W. 100, 32 A.L.R. 383; *Holker v. Hennessey*, 141 Mo. 527, loc. cit. 539, 42 S.W. 1090; 39 L.R.A.165, 64 Am. St. Rep. 524; *State v. Laundry* (Or.) 204 P. loc. cit. 975, 976; *People v. Cona*, 180 Mich., loc. cit. 650, 147 N.W. 525;

People v. Kalnin (Co. Ct.) 189 N.Y. 359; Territory v. Hoo Koon, 22 Haw. loc. cit. 602; State v. Fuller, 34 Mont. 12, 85 P. 369, 8 L.R.A. (N.S.) 762, 9 Ann. Cas. 648. The officers had a right to use the information they acquired in making that search in any way which would lead to the conviction of the defendant."

## II.

Where a peace officer has reason to believe, from the use of his senses, that an automobile is being used to transport intoxicating liquors in violation of the laws of the State of Missouri, his search of the automobile and seizure of the liquors without a search warrant is not a violation of Section 11, Article II of the Constitution of Missouri.

In the case of Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, Chief Justice Taft delivering the opinion of the Court, said:

"On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

\* \* \* \*

"The measure of legality of such seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

In the case of State v. Pigg, 278 S.W. 1030 (Supreme Ct. Mo.) the Court said (l.c. 1033):

"We think it clear that, in the circumstances of this case, where the officers detected the odor of whiskey about the automobile, they had reasonable cause to search it without a warrant.

\* \* \* \* \*

"The fact that intoxicating liquor was found in the automobile is proof enough that the search of the car without a warrant was reasonable."

In the case of State v. Loftis, 316 Mo. 878, Judge Walker said (l.c. 880):

"The offense with which the appellant is charged may be said to have been committed in the presence of the officer in that when apprehended the appellant was in the act of transporting the liquor. This being true, and the smell of liquor permeating the nostrils of the officer when he approached the car, he was not precluded from searching the same without a warrant. Where an officer has reason to believe from the use of his senses that an automobile is being used to transport intoxicating liquors, his seizure and search of the same will not be in violation of either the Federal or State Constitution. (State v. Hall, 278 S.W. 1028; State v. Pigg, 278 S.W. 1030; In Re Mobile, 278 Fed. 949; Elrod v. Moss, 278 Fed. 123; Lambert v. United States, 282 Fed. 413)."

#### CONCLUSION

The right to immunity from unreasonable interference with security in person and property is unquestionable. Section 11, Article II of our Constitution was intended to preserve that right; however, the framers of that instrument were also intent upon the proper admission of other governmental functions, among which is the efficacious enforcement of valid laws, to the end that order shall prevail. This aim of government is hardly less important than the preservation of personal liberty, for the latter is obviously dependent upon the maintenance of law and order. State v. Zugaras, 306 Mo. 492.

In construing the right of search and seizure under the Liquor Control Act of Missouri, while we may have recourse to the decisions cited in this opinion as persuasive, nevertheless, it must be remembered that the law under discussion in these decisions made

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it a felony to transport intoxicating liquors, while under the Liquor Control Act a violation thereof is merely a misdemeanor. It is fundamental that in the case of a misdemeanor a peace officer may only arrest without a warrant in a case where the misdemeanor is being committed in his presence or view.

The question of "probable cause", as cited in many of the decisions heretofore discussed, is not applicable to the case here under consideration and we are therefore limited in our interpretation of the Liquor Control Act to the following conclusion, i.e., that a peace officer may arrest without warrant any one committing a crime in his presence and view, and if the arrest be lawful, a search of the premises is also lawful, and the evidence there discovered is admissible for a prosecution against the arrested persons.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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