

illegal
SEARCH AND SEIZURE: When/intoxicating liquor is found during the progress of a bona fide search for other commodities illegally possessed, it is proper for searching officers to seize the same, and evidence so obtained may be used in prosecution.

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December 28, 1934.



Mr. T.P. Schooler,
Attorney at Law,
Salisbury, Missouri.

Dear Sir:

This department is in receipt of your letter of November 16 requesting an opinion from this department as to the following state of facts:

"A few days ago I issued a search warrant to recover some stolen flour. While the officers were searching the man's residence therein named and located, they found and retrieved a 50 lb. sack of flour and incidentally discovered some contraband liquor. Mr. Lanekin thinks he cannot be prosecuted successfully because the search warrant did not name the liquor among the articles they were searching for. I think and believe that it is the duty of an officer when he discovers unlawful possession of liquor (under Sec. 8 or 9 of Extra session 1933) to seize the same whether he has a search warrant or not. Will you give me, a J.P., your opinion of the matter?"

The general principle with respect to this problem is well stated in 56 C.J. page 1188, as follows:

"Wherever, during the progress of a bona fide search for other commodities illegally possessed, whether with a search warrant or not, discovery is made of legal evidence of the possession of another thing, the possession of which is unlawful, the thing so found may be seized."

In the case of United States v. Charles, 8 Fed. (2d) 302, the Court followed this principle of law, and said:

****But I think it by no means follows that officers making a legal search for violations of one law must deliberately shut their eyes to evidence of crimes committed against another.

* * *

Wherever, during the progress of a bona fide search for other commodities illegally possessed, intoxicating liquor is found, whether a search warrant has issued or not, it would seem that its seizure not only is legal but mandatory."

In the case here under consideration, the officers were lawfully on the premises by reason of the search warrant to recover the stolen flour.

In the case of State v. Turner (Sup. Ct. Mo.), 259 S.W. 427, Judge White said:

****The officers, being lawfully upon the premises, saw the whiskey in the possession of the defendant, and therefore the offense of unlawfully possessing the liquor was committed in their presence, and they had a right to seize it and produce it in evidence. Lambert v. United States (C.C.A.) 282 Fed. 413; United States v. Snyder (D.C.) 278 Fed. 650; O'Connor v. United States (D.C.) 281 Fed. 396.****"

CONCLUSION

In view of the foregoing, it is the opinion of this department that inasmuch as the intoxicating liquor was found during the progress of a bona fide search for other commodities illegally possessed, it was proper for the searching officers to seize the same. It is further our opinion that the evidence so obtained might be used in a prosecution for the possession of this illegal intoxicating liquor.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

Attorney General