COMMENTS

CONSTITUTIONAL REQUIREMENTS FOR AUTHORITY TO ISSUE WARRANTS

Shadwick v. City of Tampa, 407 U.S. 345 (1972)

Appellant was arrested for impaired driving on a warrant issued by the clerk[1] of a municipal court. He moved to quash the warrant on the ground that it was issued by a "non-judicial" officer in violation of the fourth amendment. The trial court denied the motion and the Supreme Court of Florida affirmed.[2] The United States Supreme Court noted probable jurisdiction.[3] *Held:* the clerk of a municipal court qualifies[4] within the requirements of the fourth amendment to issue arrest warrants[5] for violations of municipal ordinances.

1. The duties of the clerk of the municipal court of Tampa, Florida, are to receive traffic fines, prepare the court's dockets and records, fill out commitment papers and perform other routine clerical tasks. No law degree or special training is required for the job. Shadwick v. City of Tampa, 407 U.S. 345, 347 (1972).

2. Shadwick v. City of Tampa, 250 So. 2d 4 (Fla. 1971).

3. Shadwick v. City of Tampa, 404 U.S. 1014 (1972).

4. For similar holdings by state courts, *see* Commonwealth v. Penta, 352 Mass. 271, 225 N.E.2d 58 (1967); State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968). *But see* Caulk v. Municipal Court, 243 A.2d 707 (Del. 1968) (holding that warrant issuing authority is clearly a judicial function which cannot be delegated); State v. Paulich, 277 Minn. 140, 151 N.W.2d 591 (1967) (holding that a clerk not trained in law is not qualified to determine whether complaints and warrants meet constitutional standards).

5. Although most arrests are accomplished without a warrant, the practice in some jurisdictions is to issue a warrant if a subsequent decision is made to prosecute the suspect. These "post-arrest" warrants serve primarily as charging documents. There is no constitutional requirement for the issuance of post-arrest warrants when a suspect is lawfully arrested without a warrant, and, as Professor Frank Miller has pointed out, this practice has led to some confusion when the validity of a post-arrest warrant is challenged. In 1965, for example, the Supreme Court of Wisconsin held that warrants could only be issued by a magistrate, not by a prosecutor, as authorized by Wisconsin statutes. State *ex rel.* White v. Simpson, 28 Wis. 2d 590, 137 N.W.2d 391 (1965). The trial court judges in Wisconsin applied the rule to post-arrest as well as pre-arrest warrants, "and indeed in some instances held rather protracted hearings before issuing a post-arrest warrant." The matter was finally clarified in Pillsbury v. State, 31 Wis. 2d 87, 142 N.W.2d 187 (1966), which held that no warrant need be issued to charge a suspect validly arrested without one. Thus, although the case does not authorize prosecutors to issue post-arrest warrants, it dispenses with the need

The fourth amendment requires that no warrant shall issue without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Though there are circumstances in which a warrant is not required to make an arrest or search,[6] the Supreme Court has expressed a preference for warrants.[7] If a warrant is sought the issuing authority must be someone independent of the arresting and investigating officials.[8] Officers engaged in "the often competitive enterprise of ferreting out crime" are not "neutral and detached" as compelled by the fourth amendment,[9] and the Court recently invalidated a search warrant issued by a state attorney general[10] although he was acting in his concurrent capa-

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for them altogether. There seems to be no reason why other jurisdictions which make use of the post-arrest warrant could not do likewise, but for those jurisdictions which do continue to use the post-arrest warrant as a *charging* instrument, the "neutral and detached" standards ought not to apply to the issuing officer. For a detailed discussion of this problem, see F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 11-14 (1970).

6. There are many circumstances in which a search warrant is not required: 1) searches conducted with the consent of the person to be searched, *see* Mintz, *Search of Premises by Consent*, 73 DICK. L. REV. 44 (1968); Wallenstein, *Consent Searches*, 4 CRIM. L. BULL. 509 (1968); 2) search of an auto at time of stop where failure to search would allow evidence to be destroyed or leave the jurisdiction, *see* Chambers v. Maroney, 399 U.S. 42 (1970); Carrol v. United States, 267 U.S. 132 (1925); 3) searches where exigent circumstances such as time or danger to the investigating officer make it impractical to obtain a search warrant, *see* Warden v. Hayden, 387 U.S. 294 (1967); 4) a search incident to a valid arrest, *see* Chimel v. California, 395 U.S. 752 (1969); Note, *Searches of the Person Incident to Lawful Arrest*, 69 COLUM. L. REV. 866 (1969); Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433 (1969).

The Constitution does not require that an arrest warrant be obtained prior to arrest even when it is practical to do so. As a matter of state law in most jurisdictions an officer may arrest for a felony if there is reasonable grounds to believe that a felony has been committed by the person to be arrested and for misdemeanors committed in the presence of the officer. J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL 120-27 (1971).

7. *See* Beck v. Ohio, 379 U.S. 89 (1969) (arrest warrants); United States v. Ventresca, 380 U.S. 102 (1965) (search warrants).

8. *See, e.g.*, Mancusi v. DeForte, 392 U.S. 364 (1968), which held that a subpoena duces tecum issued by a district attorney could not confer the authority of a search warrant, and that even if it could, it would be invalid because not issued by a neutral and detached magistrate. *See also* Coolidge v. New Hampshire, 403 U.S. 443 (1971), discussed in note 10 *infra*.

9. Giordenello v. United States, 357 U.S. 480, 486 (1958); Johnson v. United States, 333 U.S. 10, 13 (1948).

10. Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971). The state attorney general in this case was in charge of the investigation and was later to head the prosecution of a well-publicized murder. The Court said that allowing prosecutors and

city as a justice of the peace.[11]

In *Shadwick*, the Court held that a warrant-issuing official must be both "neutral and detached," and capable of determining probable cause.[12] The municipal court clerks in *Shadwick* possessed the requisite detachment, both because of their disassociation from the activities of law enforcement and their position under the supervision of the judicial branch. Appellant contended that the clerks were "non-judicial" officers, that is, that they were civil servants who held office on appointment by an "executive officer."[13] The Court rejected this argument, however, choosing to apply the "neutral and detached" standard without regard to labels.[14]

In finding the clerks capable of determining probable cause,[15] the Court pointed out that laymen, such as comprise grand juries, have long been entrusted with the evaluation of complex factual data.[16] Since the clerk's authority[17] extended only to the issuance of warrants for violations of municipal ordinances, the Court concluded that, absent a showing to the contrary, these probable cause determinations were not too difficult a task for the clerk to accomplish. The Court expressly rejected any per se invalidation of a state or local warrant system on the

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policemen to issue warrants could not guarantee an independent determination of probable cause.

11. *Id.* at 451. The Court refused to be influenced by the attorney general's status as a "magistrate" since he did not possess the requisite neutrality. Similarly, in *Shadwick*, the Court pointed out that the terms "magistrate" and "judicial officer" had been used interchangeably for purposes of the fourth amendment, but that to "extract further significance from the above terminology would be both unnecessary and futile." Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).

12. Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).

13. Brief for Appellant at 8, Shadwick v. City of Tampa, 407 U.S. 345 (1972).

14. *See* note 11 *supra.*

15. Shadwick v. City of Tampa, 407 U.S. 345, 351 (1972).

16. *Id.* at 352 n.10: "Some communities, such as those in rural or sparsely settled areas, may have a shortage of available lawyers and judges and must entrust responsibility for issuing warrants to other qualified persons. The Federal Magistrates Act, for example, explicitly makes provisions for nonlawyers to be appointed in those communities where members of the bar are not available. 28 U.S.C. § 631(b)(1)."

17. Laws of Fla., 1903, ch. 5363, § 17:

> The Chief of Police, or any policeman of the City of Tampa may arrest without a warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person.

ground that the issuing officer is not a lawyer or a judge.[18]

There are still unanswered questions concerning the proper delegation of warrant authority. Though clerks at other levels of the judiciary clearly possess the requisite neutrality, their ability to determine whether probable cause exists for the requested arrest or search may be more carefully scrutinized if a complex crime is involved,[19] especially if a later invalidation of the warrant would create more serious consequences than it would have in *Shadwick*. Also, the Court expressly declined to decide whether a state may vest warrant authority in someone entirely outside the sphere of the judicial branch,[20] leaving open the possible use of persons independent of both law enforcement and the judiciary.

The Court has often stated a preference for judicial intervention in the arrest and search process to assure a reliable finding of probable cause and to protect the public from arbitrary and unlawful police intrusions.[21] The majority of arrests, however, occur without a warrant,[22] and even in those cases where a warrant is sought, the realities of criminal justice administration often diverge from the formal law. At least one empirical study shows that even where warrant authority is by statute confined to magistrates, it is the prosecutor who alone makes the effective warrant decision.[23] Often the issuing magistrate only cursorily scans the warrant before signing it.[24] This widely practiced

18. Shadwick v. City of Tampa, 407 U.S. 345, 352 (1972).

19. The Court in *Shadwick* stated that the clerks were capable of determining whether there was probable cause to believe there was a violation of the "common offenses covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish." Shadwick v. City of Tampa, 407 U.S. 345, 351 (1972).

20. *Id.* at 352.

21. *See, e.g.*, Whitley v. Warden, 401 U.S. 560, 564 (1971); United States v. Ventresca, 380 U.S. 102, 105-07 (1965); Wong Sun v. United States, 361 U.S. 471, 481-82 (1963); Jones v. United States, 362 U.S. 257, 270 (1960); Giordenello v. United States, 357 U.S. 480, 486 (1958).

22. Of 171,288 arrests made by New York Police in 1966, "only 366 were made pursuant to an arrest warrant." THE AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE xix & n.5 (Tent. Draft No. 3) (1970).

23. "But, regardless of who actually signed the warrant . . . it was in all cases treated as a mere ministerial duty, with the real decision having been made in the office of the prosecutor." W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 33 (1965); *see* Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U.L.Q. 1.

24. Miller & Tiffany, *supra* note 23, at 5: "At most the judge merely scans the warrant before signing; frequently he signs without examining the contents at all. Obviously whatever the reasons, it is clear that magistrates do not exercise any real control over the issuance of warrants . . . ."

"rubber stamp" procedure has been condemned by the Court,[25] but time, pressure, uncertainty in borderline cases, and faith in the law enforcement officers[26] often cause a judge or magistrate to rely on a suppression hearing to resolve the issue of probable cause.[27] Seen in this light, *Shadwick* merely extends an already abdicated function to another group of officers who cannot be expected to provide any more rigorous scrutiny of warrant applications than the judges.[28]

25. Aguilar v. Texas, 378 U.S. 108 (1964): "Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Id.* at 111. Although the Court did not mention it, Ocampo v. United States, 234 U.S. 91 (1913), upheld an arrest warrant that was issued by a magistrate but *founded* upon a probable cause determination made by a municipal prosecutor. The Court in *Ocampo* stated that "the function of determining that probable cause exists . . . is only quasi-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal." *Id.* at 100. The holding in *Ocampo* may be inconsistent with *Coolidge* and *Aguilar* insofar as it tends to authorize prosecutorial warrant-issuing, but the language quoted above lends support to the *Shadwick* decision. The Court has not yet clarified the status of *Ocampo*.

26. W. LAFAVE, ARREST: THE DECISION TO TANE A SUSPECT INTO CUSTODY 33-36 (1965): "The reason for the complete abdication of control was explained simply by one judge: 'I have complete confidence in the police and the prosecutor's office.'" No instance was observed in which a judge refused to issue an arrest warrant. *Id.* at 34. "Therefore, perhaps the principal guarantee afforded by the warrant requirement in current practice is that it prevents the arrest of some minor offender who the prosecutor feels ought not to be prosecuted." *Id.* at 36.

27. *See* L. TIFFANY, D. MCINTYRE, JR. & D. ROTENBERG, DETECTION OF CRIME 116-23 (1967). It is not unknown for the judge issuing the warrant to later rule that no probable cause existed. *Id.* at 120.

28. The argument has been advanced that the prosecutor *should* be the person authorized to issue warrants. *See* Silverglate, Book Review, 84 HARV. L. REV. 1748, 1750 (1971): "[B]ecause the prosecutor is the single party most interested in seeing that the warrant is validly issued upon probable cause, a prosecutor, rather than a 'neutral magistrate' should issue search warrants. The policeman, who usually applies for the warrant, is not only more interested in 'ferreting' than in convicting, but ordinarily is incapable of complying with the technical rules for setting out probable cause in proper form. And the magistrate (often an assistant court clerk) is more often than not a rubber stamp. The prosecutor, on the other hand, is the one faced with the task of having to try cases on the basis of defective search warrants." *Id.* at 1750 n.7.