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Searches During Routine Traffic Stops After Robinson and Gustafson: A Re-Examination of the Illinois Distinction Between “Ordinary Traffic Violators” and “Criminals”

RONALD P. ALWIN*

Shortly after the Supreme Court announced its decision in United States v. Robinson and Gustafson v. Florida a cartoon purporting to depict the effect of the decisions appeared in one of the major Chicago newspapers. The cartoon depicted a bewildered motorist, stopped for a traffic violation, being patted down by one police officer while another officer searched the car. The caption ominously stated, “Mister, the Supreme Court says if you drive with a burned-out tail light, you belong to us.”

The cartoon illustrates a common apprehension concerning the effect of the Robinson-Gustafson decisions—namely that these decisions would be used to justify a search of the person and vehicle of anyone stopped for a traffic violation. One commentator appropriately observed that these decisions appear to have spawned the belief that police officers now may search any person or vehicle in connection with a traffic offense. In contrast to this belief, the Robinson and Gustafson decisions, holding that police may conduct a full search of a person incident to an arrest for a traffic violation, were specifically limited to “full custodial arrests” in which the traffic offender is taken into police custody and conveyed by police vehicle to the stationhouse. The court of appeals in Robinson had concluded that “routine traffic arrests, where there is no evidentiary basis for a search and where the officer intends simply to issue a notice of violation and to allow the offender to proceed” are governed by the standards of Terry v. Ohio and Sibron v. New York.

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5. Several times in the course of both opinions the Court used the phrase “custodial arrest” or “full custodial arrest” when discussing the rule which it was applying.
6. 471 F.2d 1082, 1097 (D.C. Cir. 1973) (en banc).
However, the Supreme Court expressly reserved resolution of that issue and clearly limited its holding to situations in which a “full custody arrest” had been effected.9

The issue soon arose as to whether Robinson-Gustafson should be extended to permit some type of search of a traffic violator who was temporarily detained but neither arrested nor placed in custody for the traffic offense. The Illinois Supreme Court recently confronted such a case. In People v. Palmer10 the court held that a pre-arrest pat-down search of a motorist stopped for driving without license plates was not illegal and that the trial court properly had refused to suppress a loaded .25 caliber revolver discovered during the course of that search. The appellate court had held that the pre-arrest pat-down search was illegal because the officer had no reason to fear for his safety.11 In reversing, the Supreme Court of Illinois relied on the rule that a search of a person arrested for a traffic violation is permissible where the officer has reason to believe he is dealing not with the “ordinary traffic violator” but with a “criminal.” Although the arresting officer had testified that defendant gave him no cause for alarm, the court found the search legal because “. . . the absence of license plates suggests a serious violation of the law which justifies a search.”12

Justice Goldenhersh, in his dissent, agreed with the opinion of the appellate court, and indicated that because the record showed “conclusively that the search was made, not in connection with a custodial arrest, but during ‘a routine traffic stop’ ”13 and “at the time of the search a custodial arrest had been neither made nor contemplated,”14 the reasonableness of the pat-down search must be judged by the standards of Terry and Sibron. Since “a person would have to be a ‘genius’ to traverse the highways without violating some regulation of a state’s motor vehicle code,”15 the Palmer decision that motorists can be patted down without having been arrested and without having given the police officer reason to fear for his safety could have a wide-ranging effect.16

9. 414 U.S. at 236 n.6.
12. 62 Ill. 2d 261, 263, 342 N.E.2d 353, 354.
13. Id. at 267, 342 N.E.2d at 356.
14. Id.
16. Every year millions of motorists are stopped for traffic violations. In 1973, for example, there were 3,418,331 people “arrested” and issued citations for traffic violations in Chicago.
This article discusses, in the context of Illinois law, the problem of distinguishing between the traffic violator who is summarily arrested and taken into custody and the traffic violator who is temporarily detained while the police officer writes out a summons or traffic ticket or issues a warning. It is submitted that the Illinois rule which prohibits searches of "ordinary traffic violators" but permits searches of "criminals" has no application to the summons situation in which the police officer merely detains an individual for the purpose of issuing a warning or a traffic ticket. Further, this situation is governed solely by Terry and Sibron. This article is not intended as an exhaustive cataloguing of the pertinent cases. However, it is hoped that the thoughts expressed herein will help avoid a hasty and illogical application of the Robinson-Gustafson decisions and will contribute toward a rethinking of some of the problems involved in searches incident to traffic arrests or stops under Illinois law. The Palmer case serves as the principal stimulus for discussion.

People v. Palmer

On October 12, 1971, John Palmer stopped his car on Ogden Avenue in Chicago at 11:10 a.m. in front of a doctor's office. Palmer helped a lady with a baby from the car and then entered the car and pulled away from the curb. A police officer observed that the car had no rear state license plate, stopped the car and questioned Palmer. Palmer was unable to produce a driver's license, but although appearing nervous, was completely cooperative, affording the officer no undue cause to fear for his safety. While Palmer stood by his car rifling his wallet in search of a "yellow slip" (presumably an official temporary driver's license), the police officer made a "pat-down" search of Palmer's person for weapons. In Palmer's rear pocket he felt a metallic object. The officer then removed a pouch from Palmer's rear pocket which contained a .25 caliber pistol loaded with four live cartridges. Palmer was arrested and charged with unlawful use of weapons. A motion to suppress evidence was denied; Palmer was found guilty and sentenced to serve 60 days in the House of Correction.
The Appellate Court of Illinois reversed the conviction.\textsuperscript{18} The court distinguished \textit{Robinson} and \textit{Gustafson}, relied upon by the state, reasoning that those cases involved a valid custodial arrest which was held to justify a warrantless search for any item. Since the search in this case occurred prior to the arrest, the court held that it must meet the standards of \textit{Terry v. Ohio}\textsuperscript{19} and \textit{Sibron v. New York}.\textsuperscript{20} Further, the court held that the pat-down search was unreasonable because the officer, by his own testimony, had no reason to fear for his safety or believe that Palmer was armed and dangerous:

\ldots the mere facts that license plates were missing and that the individual then cannot produce a driver's license or permit, without more, do not afford a reasonable basis for believing that the individual is armed and dangerous, nor did the officer in fact so believe. We emphasize that here the pat-down search came before any arrest for the observed traffic violation or for the failure to produce the driver's license. This fact, coupled with the absence of facts warranting the officer reasonably to suspect that he was in danger of attack, rendered the search improper.\textsuperscript{21}

Although the majority did not approach the case as a "traffic" case but adopted a traditional analysis, Justice Leighton filed a special concurring opinion in which he pointed out that the case involved "the most common kind of police-citizen confrontation in our motorized society: the occasion when a peace officer has reason to believe that a motorist has committed a minor traffic violation."\textsuperscript{22} The traffic violation which Palmer was suspected of committing was punishable by a fine of not more than $100 or imprisonment for not more than 10 days and was "an offense for which the law did not require custodial arrest."\textsuperscript{23} By a practice of long standing, Justice Leighton observed, the police officer would ordinarily have issued defendant a traffic ticket which is the equivalent of a civil summons.\textsuperscript{24} More important to Justice Leighton, however, was that the police officer "had no intention of making an arrest."\textsuperscript{25} Justice Leighton's conclusion was succinct:

For these reasons, I would emphasize that when a peace officer

\begin{itemize}
\item[18.] 22 Ill. App. 3d 866, 318 N.E.2d 206 (1st Dist. 1974).
\item[19.] 392 U.S. 1 (1968).
\item[20.] 392 U.S. 40 (1968).
\item[21.] 22 Ill. App. 3d at 871, 318 N.E.2d at 210.
\item[22.] \textit{Id.} at 872, 318 N.E.2d at 210.
\item[23.] \textit{Id.} at 872, 318 N.E.2d at 211.
\item[24.] \textit{Id.}
\item[25.] \textit{Id.}
Searches During Traffic Stops

stops a motorist for a traffic violation which does not require custodial arrest and the peace officer does not intend to make one, the "pat-down," "frisk," search or touching of the motorist by the officer is illegal, unless there is some act or conduct, or some fact or circumstance which causes the peace officer reasonably to believe it necessary to "pat-down," "frisk," search or touch the motorist in order to protect himself or those around him. 26

In a brief opinion, the Illinois Supreme Court reversed, holding that the motion to suppress was properly denied. 27 Providing little illumination, the court concluded that due to the absence of license plates, the officer "was justified in believing that he was dealing with something more than the routine traffic violator." 28 The court rejected defendant's characterization of the absence of license plates as a "routine traffic violation" which did not in itself give rise to any fact from which the officer could reasonably infer that defendant was armed and dangerous with the observation that "the decisions of this court have consistently held that the absence of license plates suggests a serious violation of the law which justifies a search." 29 The court then cited and relied upon three Illinois cases 30 which are discussed later in this article.

Dissenting, Justice Goldenhersh distinguished the three cases relied upon by the majority and stated that "it is clear that in none of the three cases upon which the majority relies were the arrest and subsequent search approved solely on the basis of an absence of license plates." 31 Justice Goldenhersh found no reason to distinguish a misdemeanor committed by reason of the absence of license plates from any other traffic violation and relied upon Justice Leighton's observation that the offense of driving without license plates did not require a custodial arrest.

However, the crux of his dissent was that no arrest had occurred and therefore there could be no search unless Terry requirements were met:

. . . the appellate court correctly concluded that in the circumstances shown by this record, where at the time of the search a custodial arrest had been neither made nor contemplated, the police officer was in precisely the same position, so far as exposure

26. Id.
27. 62 Ill. 2d 261, 342 N.E.2d 353 (1976).
28. Id. at 262, 342 N.E.2d at 354.
29. Id. at 263, 342 N.E.2d at 354.
30. People v. Berry, 17 Ill. 2d 247, 161 N.E.2d 315 (1959); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960); People v. Brown, 38 Ill. 2d 353, 231 N.E.2d 577 (1967).
31. 62 Ill. 2d at 265, 342 N.E.2d at 355.
to danger was concerned, as were the inquiring officers in Terry v. Ohio and Sibron v. New York. The reasonableness of the search in this case must be judged by the standards of Terry and Sibron, and by those standards, under the circumstances which existed at the time of the search, it was unreasonable.\footnote{2}

The majority opinion is unsatisfactory. The court did not discuss the appellate court's application of Terry standards to what was agreed to be a pre-arrest search. There is no discussion of why the absence of license plates "justifies" a search. The search could not be characterized as "incident" to an arrest because the search preceded the arrest. By use of the vague phrase "justifies a search" the court avoided discussion of when the arrest occurred or whether the search was incident to an arrest. Although the court cited and purported to rely on the general rule that a search is justified when the officer believes he is dealing not with an ordinary traffic violator but with a criminal, the court avoided detailing how the policeman could conclude that Palmer was a "criminal." Finally, by summarily rejecting defendant's contention that the case involved a "routine" traffic violation, the court avoided any discussion of the common traffic stop situation in which a traffic ticket is issued.

Commentators have voiced the fear that the Robinson-Gustafson decisions have potential for a wide-reaching impact on motorists.\footnote{3} All persons who drive will probably at one time or another be stopped for a suspected traffic violation. Whether or not a person is arrested and thereby subjected to a full search depends upon the whim of the police.\footnote{4} The following discussion attempts to clarify the Illinois Supreme Court's approach to the Palmer case by placing Palmer in the context of this court's previous decisions.

**Watkins And Its Progeny**

Prior to 1960, courts generally permitted a search of the person

\footnote{2} Id. at 267, 342 N.E.2d at 356 (citations omitted).

\footnote{3} See Nakell, supra note 4. See also Scope Incident to Custodial Arrest, supra note 15, at 877; LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures:" The Robinson Dilemma, 1974 Sup. Ct. REV. 127 (hereinafter cited as LaFave); Comment, Search Incident to Custodial Arrest For Traffic Violation, 12 AM. CRIM. L. REV. 401, 411-13 (1974) (hereinafter cited as American Criminal Law Comment).

\footnote{4} Amsterdam, Perspectives On The Fourth Amendment, 58 MINN. L. REV. 349, 416 (1974) (hereinafter cited as Amsterdam):

It thereby held that whether you and I get arrested and subjected to a full-scale body search or are sent upon our respective ways with a pink multiform and a disapproving cluck when we happen to go for a drive and to leave our operators' licenses on the dressing table depends upon the state of the digestion of any officer who stops us—or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin.
and vehicle incident to an arrest for a traffic violation on the ground that the search was incident to the arrest. The reasoning of these cases was simple and closely resembled the reasoning of Robinson and Gustafson: if the arrest was legal, and the search was incident to the arrest, the search was legal.

The law in Illinois was represented by People v. Clark and People v. Berry, the latter being one of the three cases recently relied upon by the court in Palmer. In Berry, two Chicago police officers, both members of the gambling detail, observed defendant sitting in a car which bore neither state license plates nor a city vehicle sticker. As the officers approached the car they observed a man sitting in the passenger side of the car hand defendant a package of policy tickets, which defendant quickly placed in his pocket. One police officer opened the car door, took the package from defendant's pocket and “told him he was under arrest for failure to have the necessary automobile licenses and for possession of policy paraphernalia.” A subsequent search of his person resulted in recovery of additional policy tickets.

On appeal from a conviction for possession of policy paraphernalia, the Illinois Supreme Court observed that defendant “was required by law to register the vehicle with the Illinois Secretary of State, and upon his failure to do so was subject to arrest.” Since this violation was “clearly apparent to the police officers and continued in their presence, they were justified in making the arrest and accompanying search without a warrant having previously been issued.” The court also held that the search was justified as incident to an arrest for the wrongful possession of policy paraphernalia. Both justifications for the search were predicated upon the existence of a completed arrest to which the search was incident and the court simply applied the prevailing rule which permitted a search incident to an arrest: “Where the arrest is justified, for what ever cause, the accompanying search is also justified.”

36. 9 Ill. 2d 400, 137 N.E.2d 820 (1956).
38. Id. at 250, 161 N.E.2d at 317.
39. Id. at 251, 161 N.E.2d at 317.
40. Id.
41. Id.
As pointed out by Justice Goldenhersh, *Berry* is certainly a different case from *Palmer*. The officers apparently had independent probable cause to effect an arrest for the offense of possession of policy slips, which is an offense for which a search might reasonably be expected to yield fruits. *Berry* is not really a traffic offense case and is scant authority for the search that occurred in *Palmer*. More importantly, however, it is quite clear that in *Berry* defendant was placed under custodial arrest—a fact which sharply distinguishes *Berry* from the *Palmer* summons situation, but which was ignored by the Illinois Supreme Court in *Palmer*.

*Berry* was partially overruled one year later by *People v. Watkins*. Except for the nature of the traffic violation, the facts of *Watkins* are virtually indistinguishable from those of *Berry*. In *Watkins* members of the gambling detail observed defendant, who had been arrested by them twice previously, park his car too close to a cross-walk and enter a building. Defendant emerged 20 minutes later, but ran back into the building when he saw the police officers. Defendant was arrested and searched. The search resulted in the recovery of policy slips, and defendant was convicted of possession of policy slips.

On appeal defendant argued that the policy slips were obtained by means of an unreasonable search and seizure. The state, in reliance on *People v. Clark*, argued that the search was valid on the ground that the policy slips had been seized only after defendant had been validly arrested for a parking violation. The court rejected the state's position that there should be a "uniform rule permitting a search in every case of a valid arrest" in favor of examining "... the nature of the offense and the surrounding circumstances to determine whether the search was warranted." The court observed that:

[a] search incident to an arrest is authorized when it is reasonably necessary to protect the arresting officer from attack, to prevent the prisoner from escaping, or to discover fruits of a crime.

Although it was noted that "some traffic violations would justify a search," the court held that the parking violation which occurred in this case would not support a search, and overruled *Clark* and *Berry* to the extent that they were inconsistent with these views. The court also gratuitously observed that "[t]he total absence of

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42. 19 Ill. 2d 11, 166 N.E.2d 433 (1960).
43. 9 Ill. 2d 400, 137 N.E.2d 820 (1956).
44. 19 Ill. 2d 11, 18, 166 N.E.2d 433, 437 (1960).
45. Id. at 18-19, 166 N.E.2d at 437.
license plates, for example, as in *People v. Berry,* could reasonably suggest a serious violation of the law..."46 but did not enlighten us with its reasoning, which presumably led Justice Goldenhersh to observe in dissent in *Palmer* that "[t]he opinion fails to state why this is so."47

The *Watkins* Court then went on to hold that the search like the search in *Berry,* could be justified on other grounds. The fact that the officers knew defendant and had arrested him before, along with the fact that he ran back into the building when he saw them, made it reasonable for the police to assume that "they were dealing with a situation more serious than a routine parking violation."48 In *People v. Mayo,* the Illinois Supreme Court applied the same standard to searches of the vehicle of the traffic violator.

The *Watkins* case was widely received as establishing a new rule limiting searches incident to arrests for traffic violations.49 After the decision in *Watkins* "[a]n increasing number of state courts and numerous federal courts of appeal began to follow the lead of the Illinois Supreme Court, viewing searches based only upon a traffic arrest as constitutionally prohibited general exploratory searches."50 *Watkins* became the leading case and the rule first expressed in *Watkins* came to be accepted by so many courts that in 1971 the Court of Appeals for the District of Columbia stated:

[t]he vast majority of courts—both state and federal—which have considered the problem hold specifically that absent "special circumstances," a police officer has no right to search either the person or the vehicle incident to a lawful arrest for violation of a mere motor vehicle regulation."51

The Illinois statement of the rule is that the search is not permitted incident to an arrest for a traffic violation unless "circumstances

46. *Id.* (citation omitted).
47. 62 Ill. 2d 263, 265, 342 N.E.2d 353, 355 (1976).
48. 19 Ill. 2d at 19, 166 N.E.2d at 437.
49. 19 Ill. 2d 136, 166 N.E.2d 440 (1960).
50. The case was discussed in Simeone, *supra* note 17 and Agata, *supra* note 17. See also *Searches and Seizures,* *supra* note 35. The historical role of the *Watkins* and *Mayo* cases is discussed in *Search of a Motor Vehicle,* *supra* note 35.
51. *Search of a Motor Vehicle,* *supra* note 46, at 100.
52. United States v. Robinson, 471 F.2d 1082, 1103-04 (D.C. Cir. 1972). A commentator has observed that:

Special circumstances may include new information which is discovered after the vehicle is stopped, suspicious movements by one of the car's occupants providing probable cause to arrest for some other crime, or additional knowledge that the officer already has in his possession linking the driver or passengers with other crimes.

American Criminal Law Comment, *supra* note 33, at 804 n.15.
reasonably indicate that the police may be dealing not with the ordinary traffic violator, but with a criminal."

The Watkins rule and subsequent distinction between "ordinary traffic violators" and "criminals" originated in the context of a custodial arrest and was intended as a limitation on the right of the police to search incident to a custodial arrest. In both Berry and Watkins the defendant had been arrested before he was searched. The rule was never intended to apply to the situation where the traffic offender is briefly detained while the police write out a traffic ticket and then allow him to proceed. The distinction between custodial arrests and brief detentions for issuance of a traffic ticket, however, was unrecognized by the Illinois Supreme Court in the subsequent cases. In addition to avoiding discussion of whether a custodial arrest had been effected, the Illinois Supreme Court avoided a traditional probable cause analysis and came to rely more and more on the distinction between "ordinary traffic violators" and "criminals."

For example, in People v. Zeravich, defendant was stopped at 4:50 a.m. as he left a private parking lot behind a building. After defendant produced his driver's license and evidence of ownership of the vehicle, he was issued a citation for driving with obstructed vision. The officers then noticed that defendant's clothing matched that of the description of a suspect wanted in connection with several crimes in the area. Defendant was searched and at trial sought to suppress a sum of money recovered in the search. In upholding the search, the supreme court relied upon the Watkins rule that "every arrest for a traffic violation does not automatically justify a search of the arrested person," but held that the police officers had reasonably concluded they might be "facing not just a traffic law violator, but a dangerous criminal." Although in Zeravich the police had merely stopped defendant and issued a traffic citation at the time he was searched, the supreme court treated the case as if the search were incident to an arrest and failed to mention whether an arrest had occurred at the time of the search. Although the arrest and search in Zeravich were certainly supported by probable cause, the supreme court chose to characterize the case in terms of the

53. People v. Tate, 38 Ill. 2d 184, 188, 230 N.E.2d 697, 699 (1967).
54. In at least one case decided after Watkins the Illinois Supreme Court analyzed the facts to determine whether there was probable cause in the traditional sense for the search of the car. People v. Georgev, 38 Ill. 2d 165, 230 N.E.2d 851 (1967).
55. 30 Ill. 2d 275, 195 N.E.2d 612 (1964).
56. Id. at 277, 195 N.E.2d at 613.
57. Id.
distinction between "traffic violators" and "criminals" rather than simply finding probable cause to arrest quite apart from the existence of a traffic violation.

*People v. Thomas,* like *Watkins,* is a case in which defendant was first arrested for a traffic violation and then searched. In *Thomas,* defendant was stopped at 5:00 a.m. because one or both of his taillights were not operating. When asked for his driver's license, he replied that he had just gotten out of jail and did not have one; the police then arrested defendant and searched his person and the automobile. He was convicted of possession of narcotic drugs recovered from defendant's person and the car. *Thomas* was clearly in custody at the time of the search and the court relied upon *Watkins* and *Mayo* for the rule that not every traffic violation authorizes a search, but that the police may search when circumstances reasonably indicate that they are dealing not with the ordinary traffic violator, but with a criminal. The court stated that this holding

is based on the proposition that a search incident to an arrest is authorized only when it is reasonably necessary to protect the arresting officer from attack, to prevent the prisoner from escaping or to discover fruits of the crime . . . none of these circumstances is present in the case of most traffic violations.59

The court continued, on the authority of *Watkins* and *Zeravich,* that "the police officers were justified in searching defendant and the area under the front seat for their own protection before taking him to the police station for the traffic offenses."60

The following year, in *People v. Davis,* the court again had occasion to apply the *Watkins* rule. Davis was "arrested" at 1:20 a.m. for making an improper left turn and driving without a light on his rear license plate. The officer who stopped the car asked for Davis' license and informed him of the violations. When Davis emerged from the car, the officer observed a tinfoil package on the floor of the driver's side of the car. The officer opened the tinfoil package, found white powder and placed defendant under arrest and searched the car. The search led to recovery of another tinfoil package.

58. 31 Ill. 2d 212, 201 N.E.2d 413 (1964).
59. Id. at 213, 201 N.E.2d at 414.
60. Id. at 214, 201 N.E.2d at 414. There was no indication, however, that the police intended to permit Thomas to drive his car to the police station, so it is difficult to see how the police needed the protection afforded by a search of the car.
61. 33 Ill. 2d 194, 210 N.E.2d 530 (1965).
The court held that this search was justified under *Thomas* because the circumstances indicated that the police were dealing not with the ordinary traffic violator but with a criminal. Although there was no discussion of the issue, the court's comments are unclear as to when the arrest occurred. Early in its opinion the court stated that defendant was "arrested" for the two traffic violations, but later the court twice stated that defendant was not arrested until after discovery of the white powder in the first tinfoil package: "It was only then that the defendant was placed under arrest and the car was searched and the other tinfoil package found in the crack of the front seat." In any event, the case apparently did not turn upon the question of when the arrest occurred and the search was justified as incident to a custodial arrest.

Two years later the court decided *People v. Brown*, another case relied upon in *Palmer*. Brown was stopped at 1:30 a.m. because his car had no license plates. Upon questioning, Brown admitted that he had neither plates nor city sticker and was unable to produce a driver's license. He explained that he had just come from a used car lot where he had purchased the car and showed the police a title made out to the dealer from whom Brown had allegedly purchased the car, but which was not dated or signed and did not contain Brown's name. An individual who was asleep in the back seat of Brown's car told the police a different story. A search of the trunk of the car lead to recovery of items which Brown sought to suppress at trial.

In upholding the search, the court stated that "the total absence of license plates on a car could reasonably suggest a serious violation of the law which would justify a search." Defendants admitted on appeal, however, that the police were justified in suspecting that they were not dealing with a mere traffic violator, but argued that the circumstances did not justify the search of the trunk of the car without a search warrant. The court disagreed and held the search valid. That the court in *Palmer* relied so heavily on *Brown*, (which involved the search of the trunk of the car) to justify a pat-down search of the driver, indicates that the Court is more concerned with the nature of the traffic violation than with the time or scope of the search.

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62. *Id.* at 138, 210 N.E.2d at 532.
63. 38 Ill. 2d 353, 231 N.E.2d 577 (1967).
64. *Id.* at 355, 231 N.E.2d at 578.
65. In *Brown* the court refused to follow the earlier case of People v. Lewis, 34 Ill. 2d 211, 215 N.E.2d 283 (1966), which held that the search of the car was unreasonable where the driver had already been placed in custody. In People v. Jones, 38 Ill. 2d 427, 231 N.E.2d 580
In *Palmer*, Justice Goldenhersh found it difficult to perceive that *Brown* provided authority for the search in *Palmer*, noting that in *Brown* the court concluded that the officers had valid reason to suspect that the automobile was stolen.\(^6^6\) No such facts existed in *Palmer* and the court did not even suggest that there was probable cause to believe that the car was stolen. Moreover, since *Brown* dealt with the warrantless search of the trunk of the car, not a pat-down search of the driver as in *Palmer*, the only real similarity between *Brown* and *Palmer* was the absence of license plates, and it was upon this single fact that *Palmer* was decided. In *Brown*, however, the driver not only had no license plates, but also no sticker, no driver's license and a title made out to a dealer where he claimed he purchased the car. The facts of *Brown*, therefore, arouse more suspicion than those of *Palmer*.

If the total absence of license plates justifies a search, the court has also held that one absent license plate, even where the driver exhibited "nervous behavior," does not justify a search. In *People v. Reed*,\(^6^7\) defendant was stopped around noon for driving without a rear license plate. Reed did produce a valid driver's license and registration card showing he had purchased both front and rear plates. The officers testified that Reed behaved in a nervous fashion and kept looking towards his car. The officers asked if he had any weapons and when he replied negatively they searched him, but found nothing. Still suspicious, the officers decided to take defendant to the police station in order to "check him out."\(^6^8\) Before taking defendant in, however, the police searched his car and found a bag of white powder later determined to contain heroin.

The court reviewed the *Watkins*, *Zeravich* and *Thomas* cases and concluded that the search was not justified. The court stated that although defendant was stopped for driving without a rear license plate, the stop was in broad daylight and defendant had valid identification for both himself and his automobile. He neither threatened the arresting officer, used loud language or attempted to escape, and the arresting officer admitted that the sole reason for the search of defendant and his automobile was his nervous behavior.

After noting that "the total absence of license plates could reasonable suggest a serious violation of the law for which a search could

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\(^{66}\) Id. at 92-93, 227 N.E.2d at 70.

\(^{67}\) 62 Ill. 2d 261, 263, 342 N.E.2d 353, 355 (1976).

\(^{68}\) 37 Ill. 2d 91, 227 N.E.2d 69 (1967).
be made,” the Court distinguished *Berry* on the grounds that “[i]n the *Berry* case the defendants had neither front nor rear license plates nor a city vehicle sticker.” In contrast, Reed was missing only the rear plate and had a registration card to show that his car had been properly registered with the Secretary of State.

Several observations about the *Watkins* rule deserve mention. First, in *Watkins* the court rejected a “uniform rule permitting a search in every case of a valid arrest” in favor of a case-by-case approach based upon the “nature of the offense and the surrounding circumstances.” The court also stated the rule that “[a] search incident to an arrest is authorized when it is reasonably necessary to protect the arresting officer from attack, to prevent the prisoner from escaping, or to discover fruits of a crime.” In *Palmer*, however, although it was agreed that the officer was not in fear of attack, the court ignored the “surrounding circumstances” in favor of an approach which focused wholly on the nature of the violation. The court could point to no facts which indicated that the officer was even remotely in danger of attack or that Palmer might try to escape. Further, there is no suggestion that there were any fruits of the crime for which the officer was searching. Although the court in *Watkins* purported to reject a “uniform rule”, the court’s obsession with the absence of license plates has now created a uniform rule that searches of the driver and vehicle may be made whenever it appears that there is a total absence of license plates.

It is not clear, however, whether the offense of driving without license plates is so qualitatively different from other traffic offenses as to justify a search, or whether the absence of license plates is in itself and without more, probable cause to believe that some other crime, such as auto theft, has been committed.

The rejection of the court in *Palmer* of defendant’s characterization of his conduct as a “routine traffic violation” and application of the rule that the total absence of license plates “justifies a

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69. *Id.* at 94, 227 N.E.2d at 71.
70. 19 Ill. 2d 11, 18, 166 N.E.2d 433, 437 (1960). The surrounding circumstances or special circumstances approach is discussed in United States v. Robinson, 471 F.2d 1082, 1103-04 (D.C. Cir. 1972). Numerous cases, including *Watkins*, illustrating application of the rule are cited.
71. 19 Ill. 2d at 18-19, 166 N.E.2d at 437.
72. The California Supreme Court has concluded that the lack of license plates is not probable cause to believe a car is stolen, but “when an officer stops a vehicle with missing or improperly attached license plates and in addition learns the motorist is unable to produce the registration card, he may reasonably entertain the belief that the vehicle is stolen.” People v. Superior Court of Los Angeles County, 7 Cal. 3d 186, 197, 496 P.2d 1205, 1212, 101 Cal. Rptr. 837, 844 (1972).
search” leads to the conclusion that the court found the officer justified in believing that he was dealing with a “criminal.” But what “crime” was Palmer suspected of having committed? To paraphrase Justice Stewart, is the absence of license plates “a talisman in whose presence the fourth amendment fades away and disappears?”

Second, the Illinois Supreme Court has neither defined nor given body to the rather vague terms “ordinary traffic violator” and “criminal”. One interpretation, of course, is that the “ordinary traffic violator” is a person who has merely violated the traffic or motor vehicle laws, but creates no suspicion of having committed any more serious crime such as auto theft, burglary, and the like, whereas a “criminal” is a person for whom there is probable cause to arrest. But the supreme court has avoided the traditional probable cause test in traffic cases in favor of the nebulous “special circumstances” test which more often than not results in searches predicated upon “something less than the probable cause required to support a search not incident to an arrest.”

Since there is already some “probable cause” involved in the traffic violation, the argument may be that it takes only a little more to “justify” a search. In other words, the “special circumstances” need not constitute independent probable cause, but need only amount to strong reason to suspect. But what part of probable cause is supplied by an improper left turn? Admittedly there may be unusual circumstances where a driver attempts to escape, giving rise to a high speed chase, or where driving is very erratic, which may, without more, give rise to facts which support at least a pat-down search. Another exception, of course, occurs where there is reasonable cause to believe that the driver is intoxicated.

74. Note, Search Incident To Traffic Arrest: The Robinson-Gustafson Reasonable Per Se Rule, 10 TULSA L.J. 256, 263 (1975). Compare the approach of the Illinois Supreme Court in People v. Zeravich, 30 Ill. 2d 275, 195 N.E.2d 612 (1964) with the approach of the District of Columbia Court of Appeals in Brown v. United States, 365 F.2d 976 (D.C. Cir. 1966), where although the initial stop was for a traffic violation, the driver fit the description of a person wanted for a robbery. The Illinois court in Zeravich treated the case as a traffic case involving additional circumstances, whereas the court of appeals considered whether there was probable cause to arrest on the robbery charge.
75. See, e.g., Wellman v. United States, 414 F.2d 263 (5th Cir. 1969), where police observed driver tailgating another vehicle, weaving from side to side and speeding. When stopped, the driver smelled strongly of alcohol and his speech was slightly slurred. The court found “a search of the vehicle for further evidence of driving while under the influence of intoxicants was reasonable and permissible.” Id. at 265; People v. Epperly, 33 Ill. App. 3d 886, 338 N.E.2d 581 (2d Dist. 1975) (wavering on highway and inability to produce driver’s license supported inspection of vehicle to ascertain registration and search for evidence of liquor which could account for erratic driving).
At least one other court has stated a rule which recognizes that the existence of a traffic violation is not a substitute for probable cause for a search. Speaking of searches following minor traffic violations, Judge Murrah of the Tenth Circuit Court of Appeals stated: "Such searches can only be justified in exceptional, on the spot circumstances which rise to the dignity of probable cause."  

Third, the Illinois Supreme Court apparently recognizes no distinction between searches of the person and searches of the vehicle. Although in one case the Illinois Supreme Court did hold that a car search incident to an arrest for a traffic violation exceeded the permissible scope of the search, that case was overruled the following year. The rule now recognizes no distinction and holds that whenever circumstances indicate that the police are dealing with a "criminal," a search of the person and vehicle is justified.

Fourth, unlike other courts, the Illinois Supreme Court has apparently recognized no limitation on the scope of a search incident to an arrest for a traffic violation. Although perhaps this is no longer important after Robinson and Gustafson, it does show the simplicity of the Illinois distinction between "ordinary traffic violators" and "criminals." Although after Watkins was decided, other jurisdictions adopted a rule permitting a limited pat-down search of persons arrested for traffic violations but prohibiting a general exploratory search, Illinois remained committed to the all-or-nothing approach represented by the distinction between ordinary traffic violators and criminals. The former could not be searched at all and there was no scope limitation on a search of the latter.

Finally, in applying the Watkins rule, the Illinois Supreme Court has placed no significance upon whether an arrest has actually occurred at the time of the search. In Reed the defendant was actually subjected to a custodial arrest, but the search was held illegal. In Zeravich the search may have preceded the arrest, but was upheld without any discussion of when the arrest occurred.

Elsewhere the court has stated explicitly what has apparently been assumed in the traffic search cases that:

76. United States v. Humphrey, 409 F.2d 1055, 1058 (10th Cir. 1969).
77. People v. Lewis, 34 Ill. 2d 211, 213 N.E.2d 516 (1966).
80. See, e.g., Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964) (search of pocket of driver resulting in recovery of narcotics held to exceed scope of permissible search).
81. See, e.g., People v. Thomas, 31 Ill. 2d 212, 201 N.E.2d 413 (1964) (search resulting in recovery of narcotics from defendant's person and automobile held reasonable).
...it is the reasonableness of the search, whether it applies to the person or vehicle, which is of primary importance and not whether the search occurred before or after the defendant was arrested and taken into custody.\textsuperscript{82}

In upholding a search predicated upon an anonymous informant's tip that defendant had a gun, the court stated that it was not "concerned in this case with whether there had or had not technically been an arrest when the defendant was searched."\textsuperscript{83}

The Illinois Supreme Court has avoided discussion of when arrest occurs or whether, in particular circumstances, the search precedes the arrest; the assumption seems to be either that the stop itself constitutes the "arrest" or that the point of arrest is simply irrelevant.

Nowhere is the court's refusal to confront this issue more apparent than in the recent \textit{Palmer} decision. The appellate court found and the state agreed that the pat-down search preceded the arrest. Defendant maintained that the case presented only a question of whether the pat-down search was legal under \textit{Terry} standards, but the majority ignored this argument in favor of its oft-repeated statement, originating in \textit{Watkins}, that the total absence of license plates justifies a search. Apparently, the court applied \textit{Watkins} to a situation for which the rule was never intended. The traffic violation in \textit{Palmer} was a "routine traffic violation" because, as Justices Leighton and Goldenhersh observed, it would ordinarily have been handled by issuance of a traffic summons or ticket rather than by a full custodial arrest of the driver. Justice Goldenhersh stated in his dissent that the record showed "conclusively that the search was made, not in connection with a custodial arrest, but during a 'routine traffic stop'"\textsuperscript{84} where the officer would simply issue a citation and allow the offender to proceed.

Justice Goldenhersh also rejected reliance on the nature of the traffic offense and pointed out that "an examination of the authorities fails to support drawing a distinction between a misdemeanor committed by reason of failure to display license plates and other traffic violations."\textsuperscript{85} A person stopped for driving without license plates or evidence of registration of a motor vehicle\textsuperscript{86} has the option

\textsuperscript{82} People v. Pickett, 39 Ill. 2d 88, 93, 233 N.E.2d 560, 563 (1968).
\textsuperscript{83} In re Boykin, 39 Ill. 2d 617, 619-20, 237 N.E.2d 460, 462 (1968). These statements of the rule in \textit{Pickett} and \textit{Boykin} seem inconsistent with the Supreme Court's position in Rios v. United States, 364 U.S. 253 (1960) and Henry v. United States, 361 U.S. 98 (1959). See text accompanying notes 94 through 101 infra.
\textsuperscript{84} 62 Ill. 2d 261, 267, 342 N.E.2d 353, 356 (1976).
\textsuperscript{85} Id.
\textsuperscript{86} ILL. REV. STAT. ch. 95 1/2, § 3-701 (1975).
of depositing his driver's license with the officer demanding bail in lieu of other security. Pursuant to Supreme Court Rule, he could also post an approved bail bond certificate or $25 cash.

In the routine traffic stop situation the driver will be allowed to proceed if he surrenders his driver's license or a bail bond card. In the event that the driver wishes to post a cash bail, however, he must go to the police station. Does the driver's preference for posting cash bail justify a search? The appellate court has suggested that no such search is permitted merely because the traffic violator chooses to post bail at the police station. In People v. Jordan, defendant was stopped for making an illegal left turn. The driver had no driver's license but was driving on a prior driving citation, an accepted procedure in Illinois. The police officer conducted a pat-down search and discovered a small vial of pills which proved to be depressant drugs. During a hearing on a motion to suppress the trial court refused to permit defense counsel to prove that the police officer permitted defendant to drive his own car to the police station to post bond. In an opinion by Justice Egan, the appellate court held that the search exceeded the permissible scope of a reasonable search under the circumstances, and discussed without deciding whether the officer had any right to conduct a search at all. With reference to the trial court's refusal to allow defense counsel to show that the defendant was permitted to drive his own car to the station, the court noted:

If that position is correct, in every case where a motorist does not wish to surrender his driver's license after a traffic violation but wishes to post a bond at the station, or whenever a motorist does not have his driver's license, the police are justified in searching him. Such a holding flies in the face of the clear meaning of Watkins. If the police did not intend to convey the defendant in a police vehicle, what would be the basis of their right to search? A failure to have a driver's license or a preference to posting a bond rather than surrendering the license are not such facts, standing alone, that reasonably indicate to an officer that he may be in danger of an attack.

Although after Robinson and Gustafson the Jordan case is dubious authority on the scope of the search issue, the court's observations on whether a search was permissible at all remain highly perti-
The court clearly suggested that unless there is a custodial arrest, no search is permissible, even where the traffic offender does not post his driver's license, but is permitted to drive to the station to post bail. The observation that a search of a traffic violator who wishes to post bond rather than surrender his driver's license "flies in the face of the clear meaning of Watkins" lends additional support to the opinions of the appellate court and Mr. Justice Goldenhersh in Palmer.

In sum, the Illinois Supreme Court has allowed Watkins, once a leading case, to atrophy by failure to keep pace with developments since Watkins in other states. What was a good idea in Watkins has been allowed to degenerate into an unworkable and essentially subjective distinction between "ordinary traffic violators" and "criminals." This distinction which was developed to limit police searches of persons subjected to custodial arrests has been rendered obsolete by the United States Supreme Court's decisions in Robinson and Gustafson. The rule was never intended to apply to traffic stops where custodial arrest neither occurs nor is contemplated by the officer, and should not be transplanted to justify searches of motorists without probable cause in the summons situation.

**The Importance of When the Arrest Occurs**

In contrast to the approach adopted by the Illinois Supreme Court in Palmer, the appellate court did not cite Watkins or any of the other Illinois traffic search cases, but decided the case on the basis of a more traditional application of fourth amendment principles. Rather than focusing, as the supreme court did, on the nature of the traffic violation, the appellate court looked to the facts to determine the point in time at which the arrest occurred and concluded that the search preceded the arrest and was therefore illegal.91

Since the usual justification for a warrantless search of a person or vehicle is that it is incident to an arrest, defense counsel have commonly attempted to show either that the search in fact preceded the arrest, or that the arrest was not based upon probable cause and the resulting search incident to the arrest was therefore illegal. Depending upon which of these approaches is best suited to the facts of a given case, counsel attempt, during the hearing on a motion to suppress, to fix the point of arrest early or late in the encounter.

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91. "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." Sibron v. New York, 392 U.S. 40, 63 (1968).
between the citizen and the police. If the arrest occurred early and the search quite obviously followed, defense counsel would try to show that the police officers had acted too quickly in effecting an arrest actually based upon mere suspicion which had not ripened into probable cause. On the other hand, if the search occurred early in the encounter, defense counsel would attempt to demonstrate that the search preceded the arrest and was therefore illegal. When the search was substantially contemporaneous with the arrest and based upon probable cause, the courts sometimes upheld the search even if it did precede the arrest in point of time. The situations were usually complicated in that during the encounter the police officer was learning more and more about the citizen and becoming more suspicious, making it difficult to determine when his suspicions ripened to probable cause justifying the search.

The above rules have been applied to car stops with differing results. For example, in Rios v. United States, a police officer alighted from his police car and arrested a passenger in a taxicab stopped for a traffic light. The passenger was prosecuted for possession of narcotics contained in a package which the police officer testified was dropped to the floor of the taxicab by petitioner. It was conceded by the government that the officers had no probable cause to arrest at the time that the officers alighted from their car and approached the taxicab in which petitioner was riding. In that posture of the case, the Court observed that if, as petitioner had contended, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing which happened thereafter could have made the arrest lawful or justified the search as incident to the arrest. If, on the other hand, as the government argued, the policeman approached the taxi "only for the purpose of routine interrogation, and... had no intent to detain the petitioner beyond the momentary requirements of such a mission," and petitioner then voluntarily revealed the narcotics, the arrest would have been supported by probable cause. Since the "validity of the search thus turns upon the narrow question of when the arrest occurred," the court remanded the case to the district court to determine this question.

92. "It is a question of fact precisely when, in each case, the arrest took place." Id. at 67.
93. Busby v. United States, 296 F.2d 328, 332 (9th Cir. 1961); United States v. Jenkins, 496 F.2d 57, 73 (2d Cir. 1974).
95. Id. at 261-62.
96. Id. at 262.
97. Id.
In Henry v. United States, the Court held that the arrest of two suspects by FBI agents occurred when the car in which they were riding was stopped and that what the agents saw after the stop was irrelevant to the issue of probable cause and could not be used to justify the arrest and search. Although the government conceded that the arrest took place when the federal agents stopped the car, the Court added that the arrest was complete "when the officers interrupted the two men and restricted their liberty of movement..." Applying the principle that "an arrest is not justified by what the subsequent search discloses," the Court observed that "[w]hat transpired at or after the time the car was stopped by the officers" was irrelevant to the determination of whether or not the officers had probable cause for the arrest.

Although some courts have followed the Henry rule that an arrest occurs at the moment a car is stopped, other courts apparently found the principle too limiting and looked instead to what occurred after the stop to determine the precise point of arrest. For example, in Busby v. United States, a San Francisco police officer following a suspicious car stopped the car when he noticed that the light over the license plate was nonfunctional. The police officer ordered the driver and the two passengers out of the car and observed by means of the dome light a sawed-off shotgun partially concealed under the rear seat. On appeal from a federal prosecution for possession of an unregistered firearm, the court of appeals, citing Rios, undertook to determine the time at which the arrest was made and held that under California law there had been no arrest prior to discovery of the shotgun because "[n]o one had been taken into custody in this case until after the shotgun which gave rise to probable cause was seen." In emphasizing that an arrest is "a taking of person into custody" under California law, the court held that "there was no arrest or search when Officer Ryden stopped the car after seeing a violation of the California Vehicle Code." Although this result seems diametrically opposed to the Henry decision, the court distinguished Henry on the grounds that in that case the

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99. Id. at 103.
100. Id. at 104.
102. See, e.g., United States v. Miller, 452 F.2d 731 (10th Cir. 1971).
103. 296 F.2d 328 (9th Cir. 1961).
104. Id. at 331.
105. Id. The court apparently applied the principle that the validity of the arrest by local officials will be determined by reference to state law in the absence of an applicable federal statute. See United States v. DeRe, 333 U.S. 581 (1948).
prosecution had conceded that the arrest had taken place when the car was stopped.\textsuperscript{106}

Examples of cases in which the issue of whether the stop of a car was an arrest was raised are legion.\textsuperscript{107} A principle which may explain many cases is that the stop of a car is more likely to be viewed as an arrest when the stop is not for a traffic violation, but for the purpose of effecting custodial arrest of the driver for an offense other than a traffic violation. This reasoning would explain the different results in \textit{Henry}, \textit{Burhannon} and \textit{Busby}\textsuperscript{108} and probably results in numerous other cases as well. Since courts tend to look to the nature and purpose of the detention in determining whether the search was justified,\textsuperscript{109} it is not surprising that the courts have concluded that some stops are “arrests” whereas others are not. In this context use of the term “arrest” is a conclusion used to support the result that the search was either incident or not incident to an “arrest.”

More recent cases holding that the stop of a car is not an “arrest” have relied upon the “investigatory stop” concept of \\textit{Terry} and \\textit{Sibron}, which have been interpreted to permit a “forcible stop” based upon less than probable cause to arrest.\textsuperscript{110} Following the decisions in \\textit{Terry} and \\textit{Sibron}, lower courts were quick to apply the concept of the “investigatory stop” to the stop of a motor vehicle based on less than probable cause. In a case where strict application of the \textit{Henry} rule might have resulted in suppression of the evidence seized, the Ninth Circuit Court of Appeals held that the fourth amendment permitted “stopping the suspicious-acting car and detaining the car and its occupants for brief questioning.”\textsuperscript{111} The court relied on \\textit{Terry} for the observation that a “stop is to be distinguished from an arrest requiring probable cause,”\textsuperscript{112} and concluded that although there was no probable cause for arrest, the stop of the car

\begin{footnotesize}
\item[106] 296 F.2d at 332.
\item[107]  See, e.g., People v. Colon, 9 Ill. App. 3d 989, 293 N.E.2d 468 (1st Dist. 1973), where the court held that the curbing of a car is not an arrest of the driver.
\item[108]  In both \textit{Henry} v. United States, 361 U.S. 98 (1959), and \textit{Burhannon} v. United States, 398 F.2d 961 (7th Cir. 1968), the arrest was made by federal agents for a federal crime and there was no suggestion of a traffic violation. Both arrests were held invalid because there was no probable cause to arrest when the car was stopped. In contrast, in \textit{Busby} v. United States, 296 F.2d 328 (9th Cir. 1961), the car was initially stopped for a traffic violation and the arrest, based upon what occurred thereafter, was held invalid.
\item[109]  This approach also permits some check on the vast possibilities for abuse in arrests for traffic violations. See Amador-Gonzales v. United States, 391 F.2d 308 (5th Cir. 1968) (arrest of narcotics suspect by narcotics agents for a traffic violation held illegal as a pretext for a search).
\item[110]  The term “forcible stop” was used in Adams v. Williams, 407 U.S. 143 (1972).
\item[111]  Young v. United States, 435 F.2d 405, 408 (9th Cir. 1970).
\item[112]  Id. at 408.
\end{footnotesize}
was justified by facts which reasonably warranted the intrusion.

Professor Amsterdam, reading Rios, Henry and Terry together, has defined an arrest as "any restriction of a citizen's liberty which is more than brief."113

In any event, the point is that in Palmer the appellate court followed a well-recognized approach to determine when the arrest occurred and applied the rule that a search which precedes the arrest and is otherwise not supported by probable cause or reasonable grounds to believe the person searched is armed and dangerous is illegal under the fourth amendment. Implicit in the Palmer opinion is the premise that the stop of the car did not constitute an arrest, but this assumption was not stated by the court. The search in Palmer so obviously preceded the arrest that the appellate court did not discuss the problem.

In this context, however, one further point must be made. The conclusion in Palmer that the search was illegal because it preceded the arrest must be read with Justice Leighton's observation that the officer had no intention of making an arrest until the search resulted in recovery of a weapon. This view of the case explains why the search is not governed by the rule that a search may precede the arrest if it is substantially contemporaneous with the arrest. This doctrine is, of course, applicable where the officer has probable cause and intends to effect an arrest, but it should be inapplicable where there is no intention to effect an arrest, as in the routine traffic stop situation. The decision of the appellate court in Palmer was therefore correct, not only because the search preceded the arrest, but also because no arrest was contemplated at the time of the search; under those circumstances, the appellate court correctly concluded that the search must be evaluated under Terry standards.114

**SUMMONS V. SUMMARY ARREST**

The Palmer case involved "the most common kind of police-citizen confrontation in our motorized society."115 Recognizing this, Justice Leighton observed that not only did the search precede the arrest, as held by the majority, but the stop was "for an offense for which the law did not require a custodial arrest" and in fact the policy officer "had no intention of making an arrest."116

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113. Amsterdam, supra note 34, at 453 n.217.
114. For discussion of the application of Terry standards to the traffic stop situation by other courts, see text accompanying notes 147 through 177 infra.
115. 23 Ill. App. 3d at 79, 318 N.E.2d at 210.
116. Id. at 81, 318 N.E.2d at 211.
Reasoning one step further, Justice Leighton distinguished a situation involving a summary custodial arrest from a situation in which the traffic offender is merely issued a traffic ticket or summons, thereby focusing upon a distinction totally blurred by the Illinois Supreme Court's decisions in *Watkins* and subsequent cases. While this distinction may have been unimportant prior to the *Robinson-Gustafson* decisions because of the Illinois rule limiting searches even after custodial arrests for traffic violations, its importance in the wake of those decisions has been recognized.\(^\text{117}\)

Failure of the court in *Watkins* and subsequent cases\(^\text{118}\) to distinguish between alternative actions taken by police officers where a motorist is stopped for a traffic violation in part results because each of these alternatives is frequently termed an "arrest."\(^\text{119}\) But very different types of "arrests" are involved.

First, in the summons situation, the traffic offender is stopped, briefly detained and allowed to proceed with a warning or is issued a traffic ticket or citation, similar to a civil summons or notice to appear in court. In Illinois, this situation is frequently accompanied by surrender of the driver's license or a bond card.

Second, in the summary arrest situation, the policeman places the traffic violator under arrest and takes him into custody for the purpose of taking him to the police station in the police car or vehicle. The arrest may be for the traffic violation alone or for another observed offense.

Third, the traffic offender may be directed to follow the police car to the station, where he is allowed to post bond. This situation

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The Illinois Supreme Court's failure to distinguish between situations in which a traffic violator is summarily arrested and taken into custody and situations in which a traffic citation is issued has been previously noted. In an article which appeared two years after *Watkins* and before many of the subsequent cases, Professor Agata commented that the court in *Watkins* had resolved the summary arrest situation but had failed to address the summons situation. See Agata, * supra* note 17. Although Professor Agata was critical of the court's limitation of the right to search incident to a summary arrest of a traffic violator, a limitation which may no longer exist under federal law after *Robinson* and *Gustafson*, his observations are highly relevant to the situation presented by *Palmer* and future similar cases.

\(^\text{118}\) The Illinois Supreme Court is not alone in ignoring the distinction. In *Robinson*, the court of appeals observed that the government contended:

[M]ost of the courts which have considered the problem of searches incident to mere traffic arrests have failed to distinguish between "routine" arrests on the one hand and "in custody" arrests on the other.

471 F.2d at 1106.

\(^\text{119}\) See Comment, *Search Incident To Arrest for Minor Traffic Violations*, 11 AM. CRIM. L. REV. 801, 802-05 (1973) [hereinafter cited as *Search Incident To Arrest*].
Searches During Traffic Stops

frequently occurs when the driver is without a valid operator's license or is driving on a traffic citation and is required to post a cash bond. It may also result from a preference of the driver for retaining his license and posting a cash bond instead.

Although these three situations are all frequently termed an "arrest," it does not follow that the same police response is appropriate to each. This was recognized by the United States Supreme Court in Robinson and Gustafson where it was held that a full search of the person arrested was permissible in the full custodial arrest (or summary arrest) situation, but the Court refused to decide which type of police action was appropriate in the traffic citation situation.

Professor Agata's criticism of Watkins is directed to the court's failure "to recognize the distinction and secondly, in applying conclusions based upon summons situations to summary arrest situations merely because the court has chosen to call the issuance of a summon [sic] an arrest." Professor Agata argued against the Watkins rule and in favor of a rule, later accepted in Robinson and Gustafson, permitting a search incident to a summary arrest. Searches in the summons situation, however, would not be permitted unless the officer had reason to fear for his safety or unless other reasonable grounds for a search appeared.

In rejecting the syllogism inherent in People v. Clark, Professor Agata noted, the court in Watkins adopted another syllogism.

The basis of the Watkins syllogism is that all processes called "arrest," when used in connection with traffic violations, should yield the same results on search and seizure issues. . . .

120. The Palmer case is an example of the first and by far the most common summons situation. Watkins is an example of the summary arrest situation. Jordan, discussed at text accompanying notes 89 and 90 supra, is an example of the situation in which the traffic offender is permitted to drive his own car to the police station.

121. Ill. Rev. Stat. ch. 110A, § 526 (1975), which provides a bail schedule for traffic offenses, states that "a person arrested for a traffic offense and personally served by the arresting officer . . ." shall post bail in certain specified amounts.

122. See Agata, supra note 17, at 10 (emphasis added).

123. 9 Ill. 2d 400, 137 N.E.2d 820 (1956).

124. In rejecting the reasoning of Clark, the Watkins court stated:

The Clark opinion rests on reasoning that runs like this: (1) a traffic violation is a misdemeanor; (2) a police officer has a right to arrest when a misdemeanor is committed in his presence; (3) an arresting officer has the right to search the person of one whom he arrests. Each of these propositions, taken by itself and with the limitations imposed by its original context, is correct enough. But when they are combined, transplanted, and used to govern the interpretation of the constitution, they produce an improper result.

19 Ill. 2d at 18, 166 N.E.2d at 436.

125. See Agata, supra note 17, at 10.
Professor Agata criticised Watkins for taking the limitations on the right to search in the summons situation and applying those same limitations to prohibit searches in some summary arrest situations.\footnote{As already stated, Professor Agata argued that the police should have the right to search all traffic violators who have been subjected to a summary arrest and would have agreed with the Supreme Court's decisions in Robinson and Gustafson.} In Palmer the same court performed the reverse, taking a rule which it formerly applied to a summary arrest situation and applying it to a summons situation. It is ironic that a rule which originated as a limiting principle restricting police searches incident to custodial arrests should now be applied to uphold a search which took place prior to any arrest.

Failure of the Illinois Supreme Court to attach any significance to the fact of custodial arrest is illustrated dramatically by a comparison of People v. Reed\footnote{37 Ill. 2d 91, 227 N.E.2d 69 (1967).} with Palmer, both decided under the Watkins distinction between ordinary traffic violators and criminals. In Reed, defendant was placed in custody and was to be taken to the police station to be "checked out," but the search was held illegal. In Palmer, defendant had not been placed in custody and, as Justice Leighton observed, there was no intention of placing him in custody, but the pat-down search was upheld solely on the basis of the nature of the particular traffic offense and irrespective of whether a "custodial arrest" had occurred. Under Robinson-Gustafson standards, the opposite result would obtain in Reed and in Palmer as well. Clearly, as Justice Goldenhersh observed,\footnote{See also Korth, supra note 17, at 253-54; Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964).} Robinson and Gustafson are not authority for the search which occurred in Palmer.

Part of the court's confusion in Watkins, as Professor Agata demonstrates,\footnote{62 Ill. 2d at 267, 342 N.E.2d at 356.} resulted from misplaced reliance on the Michigan Supreme Court's decision in People v. Gonzales,\footnote{356 Mich. 247, 97 N.W.2d 16 (1959).} a case factually similar to Palmer. In Gonzales, the court rejected a claim by the state that the stopping of a car for a traffic violation embodies the right to search. Defendant in that case had been stopped by Michigan state troopers because only one headlight was burning. After issuing a traffic summons to the driver, who had left his car and walked back to the police car, an officer asked the two remaining occupants to get out of the car so that he could "check it." The butt of a pistol was observed protruding from under the front seat. At a
hearing on a motion to suppress evidence the officer testified that in the early morning hours cars are always checked quite thoroughly, but also admitted that they had no further suspicion in the instant case. Upon these facts, the question as posed by the Michigan Supreme Court was whether the police who stop an automobile on a Michigan highway may also routinely search the automobile under Michigan law.\textsuperscript{131}

Concerning the question of whether or not an arrest had occurred, the court preferred to examine the search on the assumption that the officers had made “a lawful, if brief, arrest by stopping and holding him until the summons was issued.”\textsuperscript{132} The court also observed, however, that the officers had no intention of incarcerating defendant or detaining him further, and therefore concluded: “... since no further detention was contemplated, there was no need to search for weapons or other means of possible escape from custody.”\textsuperscript{133}

Although the court did not have the benefit of later cases which distinguish between “investigative stops” or “forcible stops” and “full custodial arrests,” the court clearly drew a distinction between the kind of “arrest” which is merely a brief detention while the officer writes out a traffic ticket, and the type of arrest in which the offender is taken into custody.

The court also appropriately observed that to permit a search under the circumstances of Gonzales would “freely allow any officer to search any automobile on Michigan highways in the early morning hours after the issuance of a ticket for any traffic offense.”\textsuperscript{134}

Although Gonzales involved search of a vehicle, the observation that no weapons search was necessary because no further detention was contemplated is certainly broad enough to apply to a search of the driver as well. Gonzales was relied upon in People v. Zeigler,\textsuperscript{135} a case involving a search of a driver stopped and issued a summons for a traffic violation. Although the police claimed to have been acting upon a tip that the driver was engaged in an illegal betting operation, the court found that the information possessed by the police did not constitute probable cause to arrest and inquired whether the search and seizure were lawful because made while defendant was lawfully under arrest for traffic violations. The court

\begin{footnotesize}

\textsuperscript{131} Id. at 250, 97 N.W.2d at 18.
\textsuperscript{132} Id. at 253, 97 N.W.2d at 18.
\textsuperscript{133} Id. at 255, 97 N.W.2d at 20.
\textsuperscript{134} Id.
\textsuperscript{135} 358 Mich. 355, 100 N.W.2d 546 (1960).
\end{footnotesize}
quickly concluded that, for the reasons expressed in Gonzales, this search of the driver was illegal.

It is obvious that the Gonzales and Ziegler cases, relied upon by the Illinois Supreme Court in Watkins, require a different result as applied to Palmer. All three cases involved the summons situation which, by definition, cannot support a search incident to an arrest. In contrast, Watkins, in which the court purported to rely on Gonzales, involved a custodial arrest.

Other courts have also distinguished between the summons and the summary arrest situations. In Barnes v. State, the Wisconsin Supreme Court reviewed both Illinois and Michigan cases and then “brought two distinctions into clear focus which had not been dealt with adequately by the Illinois and Michigan decisions.” The Wisconsin court first distinguished the summons-summary arrest situation. Second, the court criticized the Michigan and Illinois courts for failure to recognize any distinction between a search of the driver and a search of the vehicle, indicating that “from the standpoint of the reasonableness of a search for weapons in order to protect the life of the arresting officer, the search of the trunk of the car might well be held to stand in a different category from that of the search of the person of the defendant.”

One commentator has noted that, although some courts and statutes frequently describe all traffic encounters with police as “arrests,” such encounters in many courts are more accurately referred to as “brief detentions.” In People v. Superior Court of Los Angeles County, the court interpreted the term “arrest” as used in the vehicle code as a “kind of ‘verbal’ shorthand.” In that case, the California Supreme Court considered the precise point in time at which a traffic violator is “arrested.” After observing that a police officer may legally stop a motorist to conduct a brief investigation as the result of a rational suspicion that a traffic violation may have occurred, the court declared that “the temporary restraint of the

136. 25 Wis. 2d 116, 130 N.W.2d 264 (1964).
137. Korth, supra note 17, at 264.
138. 25 Wis. 2d at 124, 130 N.W.2d at 268.
139. Id. The Illinois Supreme Court apparently refuses to recognize this distinction and in Palmer quoted from Brown to the effect that when circumstances indicate that the police may be dealing with a criminal rather than an ordinary traffic violator, “a search of the driver and his vehicle is authorized in order to insure the safety of the police officers and to prevent an escape.” 62 Ill. 2d at 264, 342 N.E.2d at 354. The Illinois Supreme Court has never explained how the search of a car after the driver is in custody will insure the safety of the officer.
140. See Search Incident to Arrest, supra note 119, at 802-04.
141. 7 Cal. 3d 186, 496 P.2d 1205, 105 Cal. Rptr. 837 (1972).
suspect's movements incident to that investigation will not ordinarily be deemed an arrest.\textsuperscript{142} Such cases lead commentators to conclude that "many courts have looked consistently beyond strict usage of this term in their determination of the fourth amendment consequences that flow from the motorist's detention."\textsuperscript{143}

Finally, the distinction between a "full custodial arrest" and the issuance of a traffic summons was recognized by the United States Supreme Court in \textit{Robinson}. In the court of appeals decision the court had discussed the "routine traffic stop" situation in which the officer would simply issue a notice of violation and allow the offender to proceed, and had concluded that no search would be authorized in such a situation unless the person stopped gave the officer reason to fear for his safety.\textsuperscript{144} The Supreme Court expressly recognized the existence of a separate question where a "routine traffic stop," rather than a "custodial arrest," occurred and expressly declined to reach the issue.\textsuperscript{145}

The Supreme Court's recognition of the distinction should deter careless application of \textit{Robinson} and \textit{Gustafson} to the summons situation. Apparently concerned about the possibility of misapplication of these cases, Justice Goldenhersh in \textit{Palmer} chided the majority for its lack of discussion of the state's reliance on \textit{Robinson} and \textit{Gustafson}, cases clearly not applicable to the pre-arrest search of \textit{Palmer}.\textsuperscript{146} Perhaps it was equally obvious to the majority that these cases were not applicable because at the time of the search Palmer had not been subjected to a full custodial arrest, but it would have been helpful for the court to so state. This might have discouraged wholesale application of \textit{Robinson} and \textit{Gustafson} to justify searches undertaken in the summons situation.

That neither the \textit{Watkins} rule nor the \textit{Robinson} and \textit{Gustafson} decisions were intended for application to the routine traffic stop or summons situation, however, is only half of the inquiry. The question remaining is what standards govern such encounters and under what circumstances the police may conduct a pat-down weapons search of a motorist stopped for a traffic violation.

\textbf{\textit{Terry} and the "Routine" Traffic Stop}

The view of Justice Goldenhersh and the appellate court in

\textsuperscript{142} \textit{Id.} at 202, 496 P.2d at 1215, 101 Cal. Rptr. at 847.
\textsuperscript{143} \textit{Search Incident To Arrest}, supra note 119, at 803.
\textsuperscript{144} 471 F.2d at 1096-97.
\textsuperscript{145} 414 U.S. at 441 n.6.
\textsuperscript{146} 62 Ill. 2d at 267, 342 N.E.2d at 356.
Palmer find support in the decisions in several state and federal courts to the effect that a pat-down search for weapons is not permissible in the routine traffic stop or summons situation in which no custodial arrest is intended. In fact, prior to Robinson and Gustafson, some courts had gone so far as to prohibit weapons searches even in the case of a custodial arrest for a traffic violation.

Prior to Terry, the New York Court of Appeals in People v. Marsh,147 held that the arrest of defendant on a traffic warrant for a speeding violation committed two years earlier did not justify a search for weapons resulting in recovery of a book of matches used to convict him on a gambling charge. The court held that a search for weapons is a "special exception to the proscription against warrantless searches" and "should not be extended beyond its purpose of securing the safety of the officer and preventing an escape."148 The court reasoned that:

A motorist who exceeds the speed limit does not thereby indicate any propensity for violence or iniquity, and the officer who stops the speeder has not even the slightest cause for thinking that he is in danger of being assaulted.149

Although the court found this limitation on weapons searches predicated on the fourth amendment, the court also held that the New York legislature had not intended to authorize a weapons search "as incident to an arrest for a traffic infraction regardless of whether the arrest was made at the scene or later pursuant to a warrant, unless the officer has reason to fear an assault or probable cause for believing that his prisoner has committed a crime" other than the traffic offense.150 To the extent that the holding in Marsh was predicated upon the fourth amendment, Marsh has been now overruled by Robinson and Gustafson insofar as it applied to full custodial arrests, but the Marsh rule still prohibits weapons searches incident to ordinary traffic stops in the summons situation.151

148. Id. at 103, 228 N.E.2d at 785-86, 281 N.Y.S.2d at 792.
149. Id. at 104, 228 N.E.2d at 786, 281 N.Y.S.2d at 792.
150. Id. at 105, 228 N.E.2d at 786, 281 N.Y.S.2d at 793.
151. Several authorities have expressed the view that an officer, who merely stops a motorist for a minor traffic violation and issues a summons has only "detained," as opposed to "arrested" the driver. If the alleged offender is merely considered "detained," then the criteria for search incident to arrest is quite obviously inapplicable. Nevertheless, a question as to the right to stop-and-frisk may still be said to exist.

Search Incident To Arrest, supra note 119, at 804. Professor Nakell has written: "Presumably, the protection offered by a frisk for weapons would not be available in a traffic stop not eventuating in a trip to the station house, in which case the officer can initiate a protective
Following the Marsh decision, Terry v. Ohio\textsuperscript{152} and Sibron v. New York\textsuperscript{153} were handed down by the Supreme Court, holding that a weapons search is permissible without probable cause where the officer reasonably concludes that criminal activity may be afoot and that he is dealing with a person or persons who may be armed and presently dangerous. One of the first cases to apply Terry to a traffic arrest was People v. Graves.\textsuperscript{154} The California Court of Appeals reasoned that the rationale of Marsh that traffic offenders are usually non-criminals must yield to the principle of Terry and Sibron permitting a reasonable protection search for weapons in every traffic arrest situation. In extending authority for a routine weapons search to the simple traffic violation situation, the Graves court cited the fact that “police officers have been killed or assaulted while making arrests for traffic offenses.”\textsuperscript{155}

The California Supreme Court in People v. Superior Court of Los Angeles County,\textsuperscript{156} however, rejected the rationale of Graves and held that, absent special circumstances, neither a search of the person nor of the vehicle is permissible in the routine traffic arrest or traffic stop situation. The court considered the question of whether Terry and Sibron would permit a routine weapons search of a motorist stopped for an “ordinary traffic violation.” The violations included a defective brake light and failure to have a car registration and a driver’s license. In rejecting Graves, the court recognized that Graves was predicated upon “the danger to the officer and the possibility of escape...if the arrestee possesses a weapon,”\textsuperscript{157} but noted that in Graves the officer was justified in his belief that the person stopped, wanted for five recent armed robberies, was armed and dangerous. The court also pointed out that the Graves court apparently relied upon its “knowledge” that police officers have been killed or assaulted while effecting arrests for traffic violations, but refused to hold that the police could reasonably expect that the ordinary traffic offender was armed and dangerous. The court adhered to its earlier assessment in People v. Superior Court of Yolo County,\textsuperscript{158} in which the court refused to permit a

\textsuperscript{152} 392 U.S. 1 (1968).
\textsuperscript{153} 392 U.S. 40 (1968).
\textsuperscript{154} 263 Cal. App. 2d 719, 70 Cal. Rptr. 509 (1968).
\textsuperscript{155} Id. at 735, 70 Cal. Rptr. at 520.
\textsuperscript{156} 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972).
\textsuperscript{157} Id. at 204, 496 P.2d at 1218, 101 Cal. Rptr. at 850.
\textsuperscript{158} 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970).
search of a motor vehicle incident to a traffic stop. Speaking of vehicles involved in routine traffic violations, the court in *Yolo County* had noted:  

"Millions of such vehicles are stopped every year, and all but a small percentage are doubtless proceeding at the time on lawful business or innocent pleasure." In *Yolo County*, the court concluded that:

Just as the arresting officer in an ordinary traffic violation case cannot reasonably expect to find contraband in the offender's vehicle, so also he cannot expect to find weapons. To allow the police to routinely search for weapons in all such instances would likewise constitute an "intolerable and unreasonable" intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile. It follows that a warrantless search for weapons, like a search for contraband, must be predicated in traffic violation cases on specific facts or circumstances giving the officer reasonable grounds to believe that such weapons are present in the vehicle he has stopped.  

The *Los Angeles County* court held that the reasoning of *Yolo County* with respect to automobile searches was equally persuasive when applied to searches of the driver. The court concluded that ordinary traffic stops provided no more reason for a search than an on-the-street confrontation and held that the police must meet *Terry* standards:

[W]hen a police officer observes a traffic violation and stops the motorist for the purpose of issuing a citation, a pat-down search for weapons as an incident to that arrest must be predicated on specific facts or circumstances giving the officer reasonable grounds to believe that a weapon is secreted on the motorist's person.  

*Los Angeles County*, like *Marsh*, also held that a weapons search was not permitted in cases of a custodial arrest for a traffic violation unless *Terry* standards were met. In so holding, the court rejected an earlier decision by the court of appeals which would have permitted a search of every traffic violator taken in custody for transportation to a magistrate. To the extent that the holding of *Los Angeles County* prohibiting weapons searches of persons subjected to a full custodial arrest was predicated upon the fourth amendment, it was also overruled by *Robinson* and *Gustafson*, but the California Su-

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159. *Id.* at 815, 478 P.2d at 453, 91 Cal. Rptr. at 733.
160. *Id.* at 835, 478 P.2d at 464, 91 Cal. Rptr. at 744.
161. 7 Cal. 3d at 206, 496 P.2d at 1220, 101 Cal. Rptr. at 852.
Supreme Court has since rejected the holding of Robinson and Gustafson and predicated its rule on the California Constitution.\(^{163}\)

In *United States v. Davis*,\(^ {164}\) a police officer stopped a motorist for crossing the center line and driving on the wrong side of the street and immediately conducted a pat-down search which resulted in recovery of a large roll of counterfeit money. The court of appeals held the search illegal under *Terry*. Another case frequently cited for the same proposition is *United States v. Humphrey*,\(^ {165}\) decided by the Tenth Circuit Court of Appeals.

The Michigan decisions in *People v. Gonzales*\(^ {166}\) and *People v. Zeigler*,\(^ {167}\) although decided several years before *Terry*, applied a similar rule to traffic stops in the summons situation; these cases still represent the law of Michigan.\(^ {168}\)

A distinction between a custodial arrest and a brief detention resulting in issuance of a traffic ticket was also observed by the District of Columbia Court of Appeals in the *Robinson* case.\(^ {169}\) The court observed that in determining the extent to which the legitimate governmental interest of insuring the safety of officers justifies a search incident to an “arrest,” it was necessary to distinguish between the “routine” traffic arrest where the officer simply issues a notice of violation and allows the offender to proceed and the more serious cases where the officer effects an “in-custody” arrest to transport the traffic offender to the stationhouse for booking. The routine traffic arrest was likened to the “investigatory stop” described as a “brief-on-the-street encounter.”\(^ {170}\) The court concluded that routine traffic arrests “where there is no evidentiary basis for a search and the officer intends simply to issue a notice of violation and allow the offender to proceed”\(^ {171}\) are governed by *Terry* and *Sibron*. The court stated the rule governing routine traffic stops as follows:

\(^{163}\) See Comment, The Scope of Search Incident To Arrest for Minor Offenses: California’s Independent and Adequate Approach, 7 Sw. U. L. Rev. 895 (1975).

\(^{164}\) 441 F.2d 28 (9th Cir. 1971).

\(^{165}\) 409 F.2d 1055 (10th Cir. 1969). See also *State v. Curtis*, 290 Minn. 429, 190 N.W.2d 631 (1971).

\(^{166}\) 356 Mich. 247, 97 N.W.2d 16 (1959).

\(^{167}\) 358 Mich. 355, 100 N.W.2d 456 (1960).


\(^{169}\) 471 F.2d 1082 (D.C. Cir. 1972).

\(^{170}\) Id. at 1096.

\(^{171}\) Id.
Thus the most intrusive search the Constitution will allow in such situations is a limited pat-down search for weapons, and then only when there exists special facts or circumstances which give the officer reasonable grounds to believe that the person with whom he is dealing is armed and presently dangerous.\textsuperscript{172}

In support of this rule the court relied upon the \textit{Yolo County} case for the proposition that the potential for violence in the routine traffic stop is so remote that to allow the police to search routinely for weapons would constitute an unreasonable intrusion.\textsuperscript{173}

Although the \textit{Robinson} case involved a custodial arrest rather than the issuance of a citation and to this extent the remarks of the court of appeals are dicta, the opinion nevertheless represents the carefully considered statement of the full court on the extent of permissible police intrusion during a routine traffic stop. It is likely to be followed in future cases involving the summons situation.\textsuperscript{174}

The decisions characterizing a routine traffic stop as a "brief detention" which falls short of an arrest are now the majority. These decisions have avoided the necessity of determining in each case the precise point at which the liberty of the traffic offender can be said to be restricted to the point where he has been "arrested"—a question surely likely to result. This is similar to determining whether the initial stop of a car was an "arrest" for purposes of the fourth amendment.

The real issue in these cases, of course, is not the abstract question of whether a person standing by his car waiting for a policeman to write out a traffic ticket has been "arrested"—but whether in this type of encounter the fourth amendment permits the police to conduct a search of the person stopped absent some additional circumstances which either provide the police with traditional probable cause or, at least, provide the officers reason to fear for their safety. To label such a stop or brief detention an "arrest" may be technically correct, but does it automatically follow that the police may conduct a search incident to this type of "arrest?" Viewing the question from the officer's point of view, the question is one of whether or not the officer is exposed to the risk of attack by the encounter with the traffic offender. The risk in a given situation will

\textsuperscript{172} \textit{Id.} at 1097.
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} The court of appeals decision in \textit{Robinson} was reversed by the Supreme Court on the question of the scope of a search incident to a full custodial arrest. The Court referred in a footnote to what the court of appeals characterized as the "routine traffic stop" and stated that since the case involved a custodial arrest, "we do not reach the question discussed by the Court of Appeals." 414 U.S. at 236 n.6.
probably be the same regardless of the precise point at which it could be said that the individual’s freedom has been restricted to the point of his being “arrested.” As observed by the California Supreme Court, “the physical risk to the officer is created by the confrontation as a whole, not by the technical niceties of the law of arrest.” The court declared:

The critical question remains, is this the kind of confrontation in which the officer can reasonably believe that a weapon may be used against him? In other words, is a routine traffic stop situation in which the officer would ordinarily issue a traffic summons the kind of police-citizen confrontation in which a police officer could reasonably believe that a weapon may be used against him? This question assumes, of course, the absence of any special or suspicious circumstances which would give the officer fear for his safety or reason to believe he is dealing with more than an ordinary traffic violator.

This question was implicitly answered negatively by the appellate court in the Palmer case when it held that the pat-down search of Palmer was not justified because the officer had no reason to fear for his safety. Justice Leighton expressly stated that his decision was based in part on the fact that this was a routine traffic encounter in which the police officer was authorized to issue a traffic summons and the driver could have posted his license or a bail card. The Supreme Court of Illinois avoided this question entirely, but sooner or later it must be answered by the Illinois courts or by the legislature.

The rule prohibiting pat-down searches of motorists stopped during routine traffic violations which do not require a custodial arrest would not expose the police to unnecessary danger. The police who patrol the streets and highways encounter citizens millions of times each year without injury. These encounters are far less dangerous than the usual on-the-street encounter between the police and a suspect or person engaging in suspicious activity. The police are far more likely to be attacked when they approach a suspected rapist or armed robber or a person acting suspiciously in an alley than they are during the average traffic stop. This prohibition permits the police to retain the right to pat-down or frisk a motorist who reasonably appears to be armed or presently dangerous or who may be likely to escape. Such pat-down searches could be conducted when

175. 7 Cal. 3d at 204, 496 P.2d at 1218, 101 Cal. Rptr. at 850.
176. Id.
the person stopped resembles a person known to be wanted in connection with investigation of a crime, or has been driving so fast or so erratically that the police may infer that he is likely to attempt to flee, or whenever else the police officer can point to specific articulable facts from which he could reasonably infer that the person stopped is armed and presently dangerous.

This rule is superior to the Illinois Supreme Court's vague distinction between "ordinary traffic violators" and "criminals" which assures adequate protection neither to the police nor the citizen. That a person stopped does not appear to be an "ordinary traffic violator" does not always indicate that the individual may be armed and presently dangerous; moreover, the term "ordinary traffic violator" itself encourages a distinction between some traffic violations thought to be "ordinary" or more "common" and others which occur less frequently, such as driving without license plates, thought to be extraordinary. On the other hand, the rule permitting the police to search "criminals" if applied to permit pat-down searches of persons stopped for traffic violations may not afford sufficient protection to the police. "Criminal" almost implies that there exists probable cause to arrest, which is not required for a pat-down search. A person may not appear to be a "criminal," yet the police officer might still reasonably infer that he is armed and dangerous.

Unlike the vague categories of "ordinary traffic violator" and "criminal," the "armed and dangerous" standard focuses precisely upon the reason for permitting a pat-down search—the protection of the officer.

After Robinsin and Gustafson

Prior to Robinson and Gustafson the legality of a search of a traffic violator in Illinois under the Watkins rule depended less on whether he was taken into custody or subjected to a full custodial arrest than upon the nature of the traffic violation and surrounding circumstances. If the circumstances gave rise to probable cause to arrest and search, the search was permitted, but was in most cases limited in scope to a search for weapons or fruits of the suspected offense. The Illinois Supreme Court, however, did not appear to

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177. The scope limitation was emphasized in Terry where the Court stated that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." 392 U.S. at 19. The scope limitation principle was thereafter applied by lower courts to the traffic search situation. See, e.g., United States v. Humphrey, 409 F.2d 1055, 1057-58 (10th Cir. 1969). Earlier cases had also applied a scope limitation principle to custodial traffic arrests. Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964). Professor Agata argued in 1962 that searches of traffic offenders who had been subjected to
recognize any limitation on the scope of a search permissible under *Watkins*.\(^{178}\) Even the ordinary traffic violator who was arrested and placed in custody was therefore protected against a search by two principles: (1) the rule of *Watkins* and similar cases that not every traffic violator could be searched; and (2) the rule which generally applied outside Illinois that even if searched, the search must be reasonably limited in scope to the purposes of the arrest. The distinction between the summons situation and the summary arrest situation recognized by some courts was, of course, an additional limitation on the right to search, but for the most part it may have been redundant. As illustrated by *People v. Reed*,\(^ {179}\) a search which was otherwise illegal would not be made legal merely by the fact of a custodial arrest.

*Robinson* and *Gustafson* eliminated the protection afforded by both the scope limitation and the principle that not every traffic violator may be searched.\(^ {180}\) After *Robinson* and *Gustafson*, every traffic violator who is subjected to a custodial arrest may be searched without any limitation on the scope of the search solely because the arrest is for a mere traffic violation.

With the scope of the search principle no longer available to limit searches of arrestees, the distinction between those who are arrested and those who are not arrested becomes crucial as the sole determining fact upon which the legality of the search turns.\(^ {181}\) The distinction between the summons situation and the summary arrest situation, unrecognized by the supreme court in the *Watkins* line of cases, suddenly looms very large.\(^ {182}\) Although the *Robinson* Court

\(^{178}\) The *Watkins* line of cases did not distinguish between a search of the person or a search of the car and recognized no limitation on the search of a person once it was determined that a search was permitted. *People v. Jordan*, 11 Ill. App. 3d 482, 297 N.E.2d 273 (1st Dist. 1973), holding that a search incident to a traffic arrest resulting in recovery of a small bottle of pills exceeded the permissible scope of the search, is one of the Illinois cases applying the scope limitation to a search incident to a traffic arrest.

\(^{179}\) 37 Ill. 2d 91, 227 N.E.2d 69 (1967).

\(^{180}\) The *Robinson* Court held that the *Terry* statement of the scope limitation principle was limited to the stop-and-frisk situation and did not really apply to searches incident to custodial arrests. 414 U.S. at 227-29.

\(^{181}\) Other commentators also have noted the importance of the distinction: A second possibility after *Robinson* rests on the distinction between a summons and a full-custody arrest. The *Robinson* rule authorizing a full search after arrest should be limited to a full-custody arrest. When a traffic ticket is issued, the officer may conduct a pat-down search only if the officer reasonably suspects that the motorist is armed.


\(^{182}\) In noting that the factors which determine when a traffic ticket is issued and when a custodial arrest is made have not been litigated, one commentator observed that "[p]rior
clearly stated that it expressed no opinion on the appropriate rule in the routine traffic situation in which no custodial arrest was contemplated, those decisions nevertheless are responsible for the belief that police officers now may search any person or vehicle in connection with a traffic offense.

As already demonstrated, the issue is somewhat confused since there are various meanings of the term “arrest.” If the Robinson-Gustafson cases stand for the proposition that the police may conduct a full search incident to an “arrest” for a traffic offense, and if the stop of a motorist for issuance of a traffic citation constitutes an “arrest,” it might be argued that the police may conduct a full search of any motorist stopped for a traffic violation. That this result was not intended by the Court is indicated not only by the footnote in which the Court disclaimed any intention of extending its holding to the “routine traffic stop” situation, but also by the Court’s careful limitation of its decision to situations involving a “full custodial arrest.”

In both Robinson and Gustafson, the Court took pains to emphasize that the authority to search was derived solely from the fact of the custodial arrest. The Court indicated that it was applying a rule which permitted a search incident to a “lawful custodial arrest” or a “full custody arrest.” The concerns of the Court were for the protection of the police officer who places a defendant in custody in order to transport him to the police station and the Court noted the great danger to an officer “in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station. . . .” In contrast, in the case of the ordinary traffic violation which does not result in a custodial arrest, the police officer is not subjected to the “extended exposure” found by the Court to justify a search. Superficially at least, the Robinson and Gustafson decisions seem to have no affect on the traffic summons situation.

Any suggestion that probable cause to arrest can be relied upon to justify a search in a situation in which no arrest has in fact been

to Robinson and Gustafson, no important issue could be found that would depend on that distinction.” Effect on New York Law, supra note 117, at 909-10.

183. The Court noted early in its opinion in Robinson that it was assumed by the court of appeals and conceded by respondent Robinson that the police officers “. . . had effected a full custodial arrest.” 414 U.S. at 219. Similarly, in Gustafson, the Court observed that it was “conceded by both parties below and in this Court that the officer had probable cause to arrest upon learning the petitioner did not have his license in his possession and that he took petitioner into custody in order to transport him to the stationhouse for further inquiry.” 414 U.S. at 262.

184. 414 U.S. at 234-35.
made is inconsistent with the Supreme Court’s decision in Cupp v. Murphy,185 where the Court upheld the taking of fingernail samplings from petitioner while he was “briefly detained at the stationhouse,”186 but not subjected to custodial arrest. In a concurring opinion Justice Marshall stated that “when a person is detained, but not arrested” the search must be limited to precisely the area that led the police to restrict the person’s freedom, but observed that the fourth amendment would have barred a more extensive search absent an arrest.187 As if in anticipation of the decision in Robinson, the Chief Justice and Justice Blackmun concurred in an opinion which agreed with restriction of the scope of the search to the very limited purpose of preserving the fingernail scrapings, but stated their view that “what the Court says here applies only where no arrest has been made” and does not apply to a search incident to an arrest,188 which, as was expressed in Robinson, admitted of no limitations in scope.

The situation in Cupp v. Murphy is similar to the traffic stop situation; although the police had no probable cause to arrest, petitioner was only briefly detained, but not arrested. Under those circumstances the Court held that a search must be supported by probable cause to believe that petitioner possessed the evidence sought in the search. A similar rule results from application of Terry to the traffic stop situation; a weapons search is permissible only if the officer has reasonable grounds to believe that the person stopped is armed and presently dangerous.

Some decisions of the Illinois Appellate Court have also loosely cited Robinson and Gustafson for the apparent proposition that a search of the driver or his vehicle is permissible incident to a traffic violation. In People v. Cannon,189 for example, a car was stopped for failure to have brake lights. Upon learning that the driver had no driver’s license or traffic ticket which might have acted as a temporary replacement, the police officer asked the driver to get out of the car and then searched the car and found two weapons. The court found that the case was “governed by” Robinson and Gustafson, although those cases dealt solely with a search of the person and said nothing to authorize the search of the vehicle. In People v. Symmonds,190 although recognizing that Robinson and Gustafson

186. Id. at 294.
187. Id. at 300.
188. Id.
189. 18 Ill. App. 3d 781, 310 N.E.2d 673 (1st Dist. 1974).
190. 10 Ill. App. 3d 587, 310 N.E.2d 208 (1st Dist. 1974).
involved a search of the person rather than the car, the court cited those cases, as well as others, in support of a car search conducted after defendant had been removed from the car. However, in *People v. Hendrix,* the court held that *Robinson* and *Gustafson* did not permit the search of the vehicle of a driver stopped for having an inoperative license plate light, who was arrested when he was unable to produce a driver's license, after which the police searched the car and discovered a gun. The court affirmed a marijuana conviction based on evidence recovered from defendant's person, but reversed the conviction for unlawful use of weapons.

In *People v. Tilden,* the court upheld the search of the driver stopped for a traffic violation after the police officer observed an empty gun holster and searched the car. Although expressing agreement with defendant that the stop alone was "not necessarily" grounds for the search, the court also observed that "the penumbra" of *Robinson* and *Gustafson* might justify the officer's limited inspection of the person and area immediately accessible to defendant "even without a prior formal arrest for carrying a concealed weapon." In a dissenting opinion Justice Johnson made particularly appropriate observations:

>[A] traffic stop is analagous to a "stop and frisk" situation—there is less than probable cause for an arrest; but under special circumstances an officer's apprehension may give him a limited right to conduct a limited search of the driver's person for the officer's protection.

Justice Johnson pointed out that *Robinson* and *Gustafson* were limited to situations in which a lawful custodial arrest had occurred, and that defendant here had not been arrested at the time of the search, and that those cases were limited to searches of the person, not intrusions into people's cars to check out suspicions.

Another case in which *Robinson* and *Gustafson* are rather casually applied is *People v. Epperly,* in which defendant was stopped for crossing the center line of the road several times. Defendant was unable to produce a driver's license when stopped. Although the opinion does not indicate that defendant had been subjected to a custodial arrest, the court cited *Robinson* and *Gustafson* for the proposition that "unquestionably there was authority to

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193. Id. at 452, 325 N.E.2d at 435.
194. Id. at 455, 325 N.E.2d at 438.
search defendant’s person.”

These cases suggest that the distinction between the summons situation and the full custodial arrest situation is not so obvious or appealing to the courts as some lawyers might like to believe. Nor is it so obvious that *Robinson* and *Gustafson* will be limited to custodial traffic arrests, in view of the appellate court’s statement in *Tilden* that the “penumbra” of those decisions justify a search “even without a prior formal arrest.” It is not unreasonable, however, to urge that, if the courts seek to extend *Robinson* and *Gustafson* to permit a search of ordinary traffic violators in routine traffic stops which would not result in a trip to the stationhouse, they should simply so state.

Another unanswered question is whether *Robinson* and *Gustafson* will be applied to permit searches of vehicles incident to either a traffic stop or a custodial arrest. An extended discussion of the problem of vehicle searches is beyond the scope of this article, but as already pointed out, the Illinois Supreme Court in the *Watkins* line of cases has not meaningfully distinguished searches of the person and of the vehicle of traffic offenders. At least one Illinois decision cites *Robinson* and *Gustafson* in support of an automobile search conducted incident to a traffic stop, although in another case the appellate court held that those cases were limited to a search of the person. Since neither *Robinson* nor *Gustafson* dealt with the search of a car, the extension of those cases to vehicle searches has been criticized.

**Police Discretion and Other Considerations**

In Illinois, “as in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer.” Following the *Robinson* and *Gustafson* decisions a police officer apparently can search anyone who commits a traffic violation merely by exercising his discretion to effect a custodial arrest, subject perhaps to the limitation that the police may not use the arrest as a pretext for a search. Since

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196. *Id.* at 888, 338 N.E.2d at 582. The search was upheld on other grounds. See note 75 *supra.*
197. 26 Ill. App. 3d at 452, 325 N.E.2d at 435.
201. It has been suggested that the search might be held illegal if a person is arrested merely to afford a pretext for a search. 414 U.S. at 238 n.2 (Powell, J., concurring). See *United States v. Lefkowitz,* 285 U.S. 452 (1932). *See also* *Amador-Gonzales v. United States,* 391 F.2d 308 (5th Cir. 1968), holding that a valid traffic arrest will not support a search where
most motorists from time to time find themselves in violation of the traffic laws, almost anyone who drives a car or is a passenger in a car may at some time be subject to the exercise of police discretion in favor of an arrest and search. To permit police pat-down searches of motorists in circumstances which do not satisfy the Terry requirements would compound "the pervasiveness and discontrol of police discretion [which] is everywhere acknowledged."²⁹² In the traffic situation where the power of the police discretion to arrest or issue a summons is virtually absolute, a New York court in a post-Robinson decision has not only recognized the importance of the distinction between summons and arrest, but has stated that the exercise of police discretion to arrest some traffic violators but not others under similar circumstances would result in a denial of equal protection of the laws.²⁹³ The same court suggested the arrests be limited by the following rule:

A police officer may arrest for a minor traffic infraction only when there is probable cause to believe that the offender is guilty of an offense other than the simple traffic infraction, or there are special circumstances in addition to the commission of the alleged traffic infraction.²⁹⁴

A commentator concerned about police abuse of discretion and pretext arrests for the purpose of conducting a search after Robinson has suggested that an arrest for an offense which could have resulted in issuance of a summons should be presumed pretextual, with the burden of showing otherwise placed on the prosecution.²⁹⁵

One way to lessen the problem of police discretion in traffic stop cases is to prohibit custodial arrests for all but a few of the more

the purpose of the arrest was to search for narcotics. In holding the search illegal, the court said:

[T]he significant element in this case is the danger that the lowly offense of a traffic violation—of which all of us are guilty at one time or another—may be established as the basis for circumventing the rights guaranteed by the fourth amendment. This danger exists in lawful traffic arrests as well as in pretext arrests. There are no fruits, instrumentalities, and contraband reasonably connected with an automobile driver's improper turn, speeding, and failure to have a driver's license—regardless of the arresting officer's motives.

391 F.2d at 318. The danger of police use of a pretext arrest has been considered much greater after the Robinson-Gustafson decision. It has been suggested that "[r]ather than letting the offender go with just a warning or a summons, the police might now make a full custodial arrest in order to conduct an incidental search." Search of A Motor Vehicle, supra note 17, at 112.

202. Amsterdam, supra note 17, at 315; on police discretion, see generally Davis, Discretionary Justice (1969).


204. Id. at 650-51, 354 N.Y.S.2d at 401.

Searches During Traffic Stops

seriously traffic offenses. The Wisconsin Supreme Court has suggested that the "policy of law, which permits arrests for minor traffic violations instead of prescribing the issuance of a summons without taking the defendant into custody as the exclusive police action, might well be reconsidered." Justice Stewart, in his concurring opinion in Gustafson, went so far as to suggest "that a persuasive claim might be made in this case that a custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." This suggestion seems bold, but when read in the context of the traffic stop situation in which the police have absolute discretion to determine who will be subjected to a custodial arrest and search, it becomes clear that the determination of when a search is reasonable has, in effect, been delegated solely to the police with the result that motorists will be secure "only in the discretion of the police." The arrest for a traffic violation, formerly reasonable when subject to the pre-Robinson search limitation, becomes constitutionally unreasonable when it becomes the vehicle for a search not predicated upon probable cause, and more importantly not subject to the requirement that "inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the competitive enterprise of ferreting out crime." The result will be an abandonment of the principle that "when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." The greater threat to fourth amendment rights posed by Robinson and Gustafson is not that arrestees will be subjected to a search greater in scope than that formerly permitted, but that the police in their sole and unreviewable discretion will decide who is to be arrested and searched.

Some states have prohibited arrests for certain traffic offenses. California, for example, has three classes of traffic offenses: those in which the violator must be arrested; those which provide for a traffic citation or a full custody arrest; and those which provide only for issuance of a traffic citation.

In Illinois, however, there appears to be no category of traffic offenses for which the police are prohibited from making a custodial

206. Barnes v. State, 25 Wis. 2d at 125-26, 130 N.W.2d at 269.
207. 414 U.S. at 266-67.
210. Id.
211. See Effect on New York Law, supra note 117, at 911.
arrest and taking the person arrested to the police station. For most traffic offenses the law apparently does not provide for the booking procedure employed for more serious criminal offenses; the traffic violator must be released immediately upon posting of his driver's license or a bail bond card and need not await an appearance before a magistrate. A driver's license or bail bond card may be posted at the scene of the traffic violation and no doubt the vast majority of traffic offenses are handled in this manner. The only traffic offense which actually requires that the driver be taken into custody is the offense of driving without an operator's license.

It has been suggested that rules be promulgated by the courts, legislature, or police department governing the circumstances under which custodial arrests for traffic offenses are permitted and the circumstances under which a pat-down search is permitted. One commentator suggested that the Robinson-Gustafson rule be limited to full-custody arrests and that police discretion to make an arrest or issue tickets be governed by judicial standards, the legislature, or police department regulations. One of the rules recommended was that "if a traffic infraction is alleged for which a summons is available, the officer may conduct a pat-down search, only if he reasonably believes that the motorist is armed." A similar rule was precisely stated by Justice Leighton in his concurring opinion in Palmer and, although it is quoted above, it is worth repeating here.

... when a peace officer stops a motorist for a traffic violation which does not require custodial arrest, and the peace officer does not intend to make one, the "pat-down," "frisk," search or touching of the motorist by the officer, is illegal, unless there is some act or conduct, or some fact or circumstance which causes the peace officer reasonably to believe it is necessary to the "pat-down," "frisk," search or touch the motorist in order to protect himself or those around him.

This rule includes the highly subjective criterion of "intent to arrest" as a justification of a pat-down search. To rely solely upon the intent of the police officer would be to abandon the objective stan-

213. Effect on New York Law, supra note 117, at 908-12; LaFave, supra note 33, at 167.
214. Id. at 117, at 912.
215. Id.
216. 22 Ill. App. 3d at 872, 318 N.E.2d at 211.
standard which now prevails. Moreover, the problems of proof of police intent or motives are treacherous and likely to result in a police officer testifying that he did intend to arrest in any case where a search was made and something was recovered. Rather, it is far better to adopt a rule which turns not solely upon police intent but which is anchored to the easily ascertainable standard of whether or not the traffic offense was one for which a summons could be issued. The result would be that "... police officers would be better guided as to the limits of their discretion, and motorists would be more secure in their constitutional rights, knowing that a minor traffic offense standing alone could not establish the basis for a search." In addition, the courts would be spared the determination in each case of both the precise point of arrest and whether the officer intended to make the arrest. In some cases, the courts would still have to decide whether the circumstances reasonably warranted the officer's belief that the traffic offender was armed and dangerous, but this burden would be no more onerous than that presently imposed under Terry.

It is possible that application of higher standards under the state constitution might lead the Illinois Supreme Court to reject the Robinson-Gustafson solution in favor of the rule which formerly prevailed. Since "the United States Supreme Court standard for search and seizure are read into Illinois law," however, it seems unlikely that the Illinois courts will follow the lead of those states which have rejected Robinson and Gustafson in favor of higher standards under their own state constitutions.

217. See United States v. Jenkins, 496 F.2d 67 (2d Cir. 1974) (validity of search does not depend upon intent of officer or prosecutor).

218. The problems with evidentiary determinations of the intent or motives of the police officer make reliance on intent to arrest an undesirable. See LaFave, supra note 33, at 154-55. Honest examination of the cases leads to the conclusion "that many courts will uphold a search incident to a traffic arrest in the face of clear evidence of an ulterior motive." Id. at 155. Watkins, which involved an "arrest" by gambling detail officers for a parking violation, is one of the cases cited for this proposition.

219. See Search Incident To Arrest, supra note 119, at 805.

220. People v. Emert, 1 Ill. App. 3d 993, 274 N.E.2d 364, 367 (2d Dist. 1971); see also People v. Grod, 385 Ill. 584, 53 N.E.2d 591 (1944). The court observed that "the guarantees of the Fourth and Fifth Amendments of the Constitution of the United States are in effect the same as sections 6 and 10 of Article II of the Illinois Constitution, and are construed alike. . . ." 385 Ill. at 592, 53 N.E.2d at 595.

221. In Cooper v. California, 386 U.S. 58 (1967) the Supreme Court recognized "the State's power to impose higher standards on searches and seizures than those required by the Federal Constitution if it chooses to do so." 386 U.S. at 62. Courts in some states have accordingly rejected Robinson-Gustafson in favor of higher standards under state law. See Effect on New York Law, supra note 117; Note, The Scope of Search Incident To Arrest for Minor Offenses: California's Independent And Adequate Approach, 7 Sw. U. L. Rev. 895
The Illinois legislature could consider an amendment to the Illinois stop-and-frisk statute providing that when a peace officer stops a person for questioning or stops a motorist for a traffic ticket, as opposed to making a custodial arrest, and the officer reasonably suspects that he is in danger of attack, he may search for weapons. Such an amendment would be a clear indication of legislative intent that pat-down searches of motorists stopped for routine traffic violations should not be made unless Terry standards are set.

CONCLUSION

In conclusion, the following points should be stressed. The Watkins rule resulting in a distinction between "ordinary traffic violators" and "criminals" for fourth amendment purposes was intended as a limitation on the traditional right to search incident to a custodial arrest for a traffic violation. Although the Illinois Supreme Court has not expressly recognized the distinction between summary custodial arrests for traffic violations and routine traffic stops resulting in issuance of a traffic summons, the Watkins rule has no proper application to the summons situation.

The Illinois distinction between "ordinary traffic violators" and "criminals" is vague and fails to afford sufficient protection to either the police or the citizen. Robinson and Gustafson have overruled Watkins to the extent that searches incident to custodial arrests of ordinary traffic violators were previously prohibited, but the Robinson and Gustafson cases are limited to custodial arrests and have no application to the routine traffic stop situation. Searches during a routine traffic stop for a violation for which the police officer may issue a traffic ticket or summons are governed by Terry and Sibron. A pat-down search of the driver in such situations violates the fourth amendment unless the police officer reasonably believes that a pat-down or frisk for weapons is necessary to protect himself or another person.

The Illinois Supreme Court under Watkins and its progeny has

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(1975). See also State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974), rejecting Robinson-Gustafson in favor of higher standards under the Hawaii constitution. The possibilities for independent and adequate state grounds are not limited to state constitutions. In New York it has been held both before and after Robinson-Gustafson that the legislature simply did not authorize custodial arrests for traffic violations. See People v. Marsh, 20 N.Y. 2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967) and cases cited in Effect on New York Law, supra note 117.

222. Ill. Rev. Stat. ch. 38, § 108-1.01 (1975) provides:

When a peace officer has stopped a person for temporary questioning . . . and reasonably suspects that he is in danger of attack, he may search the person for weapons.
not distinguished between searches of the person and searches of the vehicle, but the better rule, recognized by several other courts, is to limit searches incident to an arrest of the driver, unless there is probable cause for a search of the vehicle or such search is actually necessary to protect the police officer or other persons. After Robinson and Gustafson the determination of who is to be searched incident to an arrest is left to the discretion of the police, a circumstance which arguably violates the fourth amendment.

The effect of Robinson and Gustafson, therefore, may well be to render unconstitutional all arrests made in the summons situation in which the decision to arrest or not arrest is exclusively within the discretion of the police. Since anyone arrested will be subject to a full search incident to the arrest, the decision which the constitution requires be made by a neutral and detached magistrate has been relegated to the discretion of the police.

The legislature, courts or other rule-making authority should provide rules to limit the circumstances in which the police may either arrest and search or conduct a pat-down search for weapons of motorists stopped for traffic violations which ordinarily would result in issuance of a traffic ticket.