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Supreme Court of the United States

OCTOBER TERM

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 Supreme Court, U. S.
 APR 3 1970

In the Matter of:

Docket No. 727

DONALD J. VALE,

Appellant

vs.

THE STATE OF LOUISIANA,

pt. 2

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ORAL ARGUMENT OF:

P A G E

Eberhard P. Deutsch, Esq. on behalf of Appellant 2

Louise Kornis, Assistant, District Attorney for
The Parish of Orleans, on behalf of Respondent 21

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM

3 -----

4 DONALD J. VALE,)
5 Appellant)
6 vs) No. 727
7 THE STATE OF LOUISIANA,)
8 Appellee)
9 -----

10 The above-entitled matter came on for argument at
11 10:10 o'clock a.m., on Thursday, March 5, 1970.

12 BEFORE:

13 WARREN E. BURGER, Chief Justice
14 HUGO L. BLACK, Associate Justice
15 WILLIAM O. DOUGLAS, Associate Justice
16 JOHN M. HARLAN, Associate Justice
17 WILLIAM J. BRENNAN, JR., Associate Justice
18 POTTER STEWART, Associate Justice
19 BYRON R. WHITE, Associate Justice
20 THURGOOD MARSHALL, Associate Justice

21 APPEARANCES:

22 EBERHARD P. DEUTSCH, ESQ.
23 Hibernia Bank Building
24 New Orleans, Louisiana 70112
25 Attorney for Appellant

LOUISE KORNS, Assistant District
Attorney for the Parish of New Orleans
Criminal Courts Building
2700 Tulane Avenue
New Orleans, Louisiana 70119

1 put something in his mouth and swallow it, which to experienced
2 narcotics officers, like this, just meant one thing: that he
3 was swallowing narcotics.

4 So, after they arrested the man in the car and
5 Donald Vale, they frisked them briefly and found nothing on
6 them: no weapons, no narcotics, and then the police officers,
7 the record shows, told Donald Vale that they were going to
8 go in and search his house, the door to which he had left
9 open in coming out to make this sale, to find the narcotics
10 that they were sure were the source of this supply that he had
11 passed on to his associate.

12 Thereupon, they entered the house. Shortly there-
13 after, within minutes thereafter, Mrs. Vale and Donald's
14 brother, James, entered the house and the police officers
15 informed them also that they were going to make this search.
16 And then, within five or ten minutes, in the back bedroom,
17 which appeared to be a man's bedroom, the police officers
18 testified they found the heroin and dilaudid they were seeking
19 in the coat, several coats hanging in a clothes locker.

20 The State of Louisiana believes that following the
21 legal arrest, which clearly took place here in front of the
22 house, the police officers were entitled to make an inciden-
23 tal search.

24 Q Was the arrest legal because of the capias that
25 the officers had, or was it legal because of what they had

1 seen?

2 MRS. KORNS: What they had seen, Mr. Justice. We
3 don't rely on those capiases. The State of Louisiana feels
4 that they stayed out of the picture as far as this search went.

5 They only say that adding probable cause for the
6 warrantless arrest, because they were for narcotics offenses
7 which had occurred a couple weeks before, and moreover, at
8 least one of these three officers had been involved, the
9 record shows, in those prior arrests.

10 And the record also shows that at least one or more
11 of these officers had not only arrested Donald Vale, either
12 had been connected with these prior arrests, or were familiar
13 with these narcotics, knew Saucier, the man to whom he was
14 apparently selling, knew that this house was lived in by Mrs.
15 Vale and Donald's brother James. The record shows that; they
16 knew that.

17 So, the State of Louisiana is not relying at all on
18 these capiases for this arrest, but only on this warrantless
19 arrest, which took place before the house.

20 Now, the evidence shows that the police officers
21 didn't know who was in that house when they arrested Donald
22 and Saucier out in front. It shows that the officers were
23 very concerned with the idea that at this very moment, either
24 Mrs. Vale or brother James, or Donald's girl friend, who
25 traveled around with him to these various addresses, was right

1 at that very time getting -- either hiding the narcotics,
2 taking them out the back door, disposing of them in some way.

3 So, as Louisiana sees it, there was the dilemma
4 faced by these officers, and they either had to seize this
5 evidence right now or not at all, because I know yesterday the
6 Court was posing a problem of whether there were any alterna-
7 tives to an immediate warrantless search. And, as a practical
8 matter, it's Louisiana's position that there were no practical
9 alternatives, because of the time involved in getting a war-
10 rant, and the fact that the officers - one thing is clear, not
11 knowing whether anyone was in the house or not, the officers
12 had to enter the house and search it fairly thoroughly to find
13 out even whether someone else was in the house, because con-
14 federates often hide in closets and under beds, as this Court
15 knows, and it was only by a fairly thorough search of the house
16 that the officers could even determine that there was no one
17 in the house to --

18 Q They generally don't hide in somebody's coat
19 pocket.

20 A No; that's perfectly true; that's right, but they
21 had to make a search of the house in thorough detail to be
22 sure that no one was hiding in the house: in closets, in rooms
23 and so forth and under beds.

24 Q Do you think they were entitled at that point to
25 search for firearms to see whether they were exposed to any

1 danger from the occupants of the house?

2 A Well, actually, I think the question of violence
3 I guess, is always lurking in the background, but with
4 narcotics addicts, generally I don't think weapons are gen-
5 erally involved in these crimes. I think mostly the police
6 officers are concerned and the record here shows, with getting
7 to the evidence before the people involved with the narcotics
8 can get rid of it.

9 In this case, Saucier got rid of the narcotics with
10 which Vale had just sold him by swallowing it. And the
11 record here shows that the officers rushed first to the bath-
12 room to listen for the sound of running water when they
13 approached. They testified to that, and looked around, and
14 looked in the toilet bowl and so forth, because -- looked in
15 the basement and in any drain like that where narcotics could
16 be disposed of.

17 So, really I think -- I don't think -- I will be
18 frank and say, "No, I don't think the officers were afraid
19 that they would be shot at from the house of anything. I
20 think their primary and only purpose was to try to get ahold
21 of the narcotics which they were convinced they had just seen
22 Donald Vale sell, because of Saucier swallowing that evidence
23 But that right there, if Saucier hadn't swallowed the
24 evidence, they would have arrested Vale for this present nar-
25 cotics sale and if Saucier had had the evidence; that would

1 have been it.

2 Q Have the officers testified they were not looking
3 for weapons?

4 A Your Honor, it didn't even come up.

5 Q They haven't testified at all about it?

6 A That's right. There is no testimony at all on
7 that subject, and really I don't think it was, you know, a
8 matter in which anyone, either the defense or the accused was
9 interested at the trial of this case, for instance.

10 Q Do you think that officers going into a place
11 like this could be interested in whether or not there might be
12 a gun?

13 A Well, sure; I mean, I think they -- I don't mean
14 there is concern with guns for narcotics addicts, as they are
15 for, say, burglary suspects, or people who commit crimes of
16 violence. There is no doubt about it, when they frisked down
17 Vale and Saucier when they arrested them, I think the record
18 will show, maybe, that they were frisking them for the
19 possibility of weapons or narcotics. But they did testify
20 that they wanted to go in that house because they were sure
21 that that's where the hoard of narcotics was.

22 Q When they went in the house, as I understand it,
23 except for this appellant here, whom they had just arrested,
24 there was nobody in the house.

25 A That's right; the thing is that they didn't know

1 that, though, Mr. Justice, until they had gone all through the
2 house to be sure. They knew that Mrs. Vale and James lived
3 there and then, of course, when Mrs. Vale and James showed up,
4 within about five minutes after the officers got in the house
5 but before they had found the narcotics. Then, the only per-
6 son who could have been hiding in there was Donald's girl
7 friend. But, I think by that time they had gone through the
8 house enough to be sure that nobody was in the house. But
9 they didn't know this until they got in.

10 Q And the fact is: there was nobody in the house.

11 A The fact is there was nobody, but they had no
12 way of knowing it. And, as a matter of fact, as I say, the
13 record shows that they possibly knew that somebody could be
14 there.

15 Now, the State of Louisiana just wants to pose to
16 this Court the practical difficulties involved if the police
17 were going to get a warrant to search for this narcotic
18 evidence.

19 As I said, they first had to get into the house to be
20 sure no one was hiding in there, or it would have done no good
21 to put a cordon around the house without first finding out that
22 there was nobody in it.

23 Having found out that the only two people in it were
24 James and Mrs. Vale, then they would have had to call other
25 police officers to keep these people under surveillance --

1 their movements under complete surveillance, or take them out
2 of the house, during the time in which it took to get a
3 search warrant.

4 And, in Orleans Parish, at least, search warrants are
5 issued by criminal district court judges and these -- at least
6 one of these arresting officers, because only they three knew
7 the facts, would have to go back to the police bureau and type
8 up the affidavit, and you have to type up an affidavit for a
9 search warrant in about six duplicates. Police officers don't
10 reduce probable cause to writing with the greatest of speed.
11 It's been my experience these men often have all kinds of
12 reasons why they do things. They are not the most articulate
13 people in the world, particularly when they have to write
14 down, and often in the past, they used to put down too little,
15 but now because court decisions throw out warrants, they put
16 down much too much. They put on everything they have seen and
17 done and so forth and it runs on for pages.

18 Then they've got to find a judge to study this
19 warrant and find out whether it states probable cause and if
20 he in his court or in his chambers, and busy; they have to
21 wait to present it to him and if he's gone home, then they
22 have to track him down and find him and I think at the best,
23 with everything going in your favor, it takes at least three
24 hours to process a search warrant, and often it takes a whole
25 day before you can get the whole thing typed up and the judge

1 satisfied and signed and back and served. The copies, you
2 have to give one to the Clerk's office so they will know what
3 property you are going to search, going to seize, and then
4 make returns of it.

5 So, really, you know, the record here shows that the
6 officers approached Donald Vale's house around noon. With
7 luck, they could very well have been back with a search warrant
8 later that afternoon. And if any little interference had
9 come up, for some reason or another, they might not have been
10 back until the next day.

11 And unless they had kept these people under close
12 surveillance, there wouldn't have been any narcotic evidence
13 left in that house when they got back.

14 Q How can you say that? If, after they had seen
15 this transaction and they had just simply gone down and gotten
16 a search warrant, they hadn't been seen by Vale or anybody
17 else at that time.

18 A Well, in the first place, they didn't know that
19 they hadn't been seen by the Vales and actually, for all they
20 knew, there were people in the house watching everything they
21 did, or they might very well have been neighbors watching what
22 they did. They don't know about that. But, these things get
23 around very quickly among people of this type.

24 Not only that, Mrs. Vale and James came back to the
25 house within minutes after the police officers got into the

1 house, so therefore, they might very well have gotten back
2 the house, seeing the police officers put Saucier and Donald
3 into the car. I mean --

4 Q What kind of a neighborhood was this in New
5 Orleans, residential or commercial or whatever?

6 A Yes, Your Honor, residential. Small, sort of
7 shotgun houses, close to each other.

8 Q There were three officers?

9 A Yes.

10 Q And there were two entrances to the house: one
11 front door and one back door?

12 A There was a back door entrance leading into the
13 yard, that's clear, because the record shows that the -- one
14 of the officers ran out the back door to look in the yard and
15 see if there was any disposal evidence --

16 Q Well, once you found that there was no body in the
17 the house, no person, it would have taken two policemen to
18 make sure that nobody disturbed the evidence, wouldn't it?

19 A That's right.

20 Q So, we take one policeman with the two prisoners.

21 A They couldn't have done that, Mr. Justice. One
22 policeman couldn't guard two prisoners. That would be bad
23 security. You would have to at least have two police officers
24 in the car with two prisoners: one police officer to drive and
25 one to watch the prisoner.

1 Q Well, they could have left the prisoners there.

2 A There is no doubt about it --

3 Q Doesn't the record show that two police officers
4 went inside and one stayed out with the prisoners?

5 A No; I don't believe so. I think the record shows
6 that all of them went in, all of the police officers and
7 Donald Vale and Saucier and that then Mrs. Vale and James
8 arrived.

9 Q Well, could they have gotten one more policeman
10 in New Orleans to watch the back door and one watch the front
11 door and the evidence could not have been destroyed?

12 A There is no doubt about it. Louisiana admits
13 they could have. Our only position is that this would have
14 taken a long time and it would have interfered with the
15 liberty of Mrs. Vale and James Vale inordinately. And,
16 supposing in the end they hadn't found them?

17 Q Didn't they arrest James Vale?

18 A They arrested him after they found the narcotic
19 evidence.

20 Q Well, that's interfering with him. They didn't
21 mind arresting him.

22 A Well, they arrested him for possessing narcotics,
23 Mr. Justice, after they had searched the house and found the
24 narcotics in his bedroom, as his mother said.

25 But, we're talking about the preliminary situation

1 when the officers had just arrested Donald and Saucier right
2 outside of the house engaged in the narcotics transaction.
3 And then the whole issue they had to decide on the spur of the
4 moment, was whether to go in that house and look for those
5 narcotics. They didn't know whether anyone was in the house
6 or not; that's the situation we have.

7 Right there. They had to go in the house to see if
8 anyone was there. And there is no doubt about it, we concede
9 that they could have gone in and looked around seen no one was
10 there; then they could have called other police, placed guards
11 around the house and gone up and gotten a warrant. This would
12 have taken anywhere from three hours to the next day. We
13 concede that.

14 Q Well, you would be making the same argument,
15 wouldn't you if they had arrested him six or eight blocks away
16 on the way to his house; say he was going from work home and
17 they just intercepted him on the street and they thought there
18 was probable cause that he had narcotics in his house. Assume
19 they did have probable cause to think he had narcotics in his
20 house, you would be making the same argument, that you should
21 not have to wait for a warrant in order to search the most
22 likely places where narcotics might be located?

23 A No, Mr. Justice. We are relying on the several
24 decisions of this Court that following a valid arrest the
25 police can make a search incident to that arrest, at the place

1 of that arrest. And the only issue here is whether the place
2 was extended a little too far, as we see it, because Donald
3 Vale was arrested at the front door of his house.

4 Q Well, how do you distinguish Shipley?

5 A Shipley, we distinguish very clearly. In Shipley,
6 for instance, the only similarity between this case and
7 Shipley is that both arrests took place outside the house.
8 But, unlike this case, in Shipley the police officers weren't
9 watching and didn't see Shipley going in and out of his house
10 committing a crime. Shipley had committed that crime several
11 days before and they were just at his house to arrest him for
12 this crime they had heard about.

13 Secondly, Shipley didn't involve narcotics --

14 Q You're saying in Shipley, apparently, they didn't
15 even have probable cause to search the house; is that your
16 point?

17 A Well, the thing is, as I see it, in Shipley, not
18 only that, they could have gotten a search warrant in Shipley,
19 as this Court pointed out. They first went into the house in
20 Shipley, and they had already alerted Shipley's associates to
21 the fact that they were in search of -- that his wife was in
22 there. They already knew it and then they went back out and
23 staked it out and during the stakeout they could have -- which
24 went on for several hours, they certainly could have gotten
25 a warrant. It wasn't an emergency situation which,

1 here this emergency situation just developed in front of
2 officers as they went to serve this two old alis capiases.

3 They were presented with this emergency situation;
4 completely unforeseen a sale took place in front of their
5 eyes. Then what were they going to do about trying to get
6 that evidence which they knew was in that house? It all
7 happened just like that.

8 Q Mrs. Kornis, let me go back to the hypothetical
9 that Mr. Justice White put to you. That is, if he had en-
10 countered Vale six blocks away from the house, in that circum-
11 stance, would he have had any basis for thinking the house
12 was the source of supply, not having seen him come from the
13 house to make the sale?

14 A Not at all; not only that, but the house wouldn't
15 have been the place of the arrest. Here, it's true that the
16 arrest took place at the front steps of the house, but the
17 remember this, Donald Vale had gone into the house when
18 Saucier had first let him know he wanted narcotics; had come
19 out of the house, leaving the door open, looking up and down.
20 When Vale saw the police officers approach his house and
21 arrest Saucier right there at the car, he turned around and
22 started to walk toward the front door, and as a matter of fact,
23 if the police officer had been aware of all the decisions which
24 police aren't; if I had been there, I would have just waited a
25 minute and let Donald Vale walk back into his house, and then

1 in a few steps he would have been inside the house and you
2 say, "All right, although I guess, under Chimel, I guess you
3 would have had to let him walk all the way back to the closet.

4 But anyway, nevertheless, it was so clearly a
5 question of the arrest taking place at the scene -- the search
6 taking place at the scene of the crime immediately contempor-
7 aneous with the crime. So, we think that these are the factors
8 which govern this case and would clearly distinguish an arrest
9 which took place in the street, for instance. There, the
10 place would be in the street, and there the officers would
11 only look around the feet of the accused, for instance.

12 Now, the State of Louisiana feels that this emergency
13 situation is so similar to the one that existed in Schmerber,
14 for instance, or in Warden versus Hardin. We can't see the
15 difference.

16 Of course in Schmerber it involved a blood sample and
17 Warden versus Hardin it involved the offenses of burglary, but
18 nevertheless, the basic situation is the same. The police
19 officers were faced with a situation in which they have got to
20 act quickly or the evidence they are going to seize is not
21 going to be there anymore. They are faced with this situation
22 and narcotic evidence disappears just as rapidly as does
23 alcohol in the blood.

24 Not only that, but I would like to point out to this
25 Court, that if police officers can't make searches for narcotics,

1 such as exist in the present case, they can't really ever
2 seize this evidence, because how would they ever get a search
3 warrant -- or let's say that the police officers, like in the
4 present case, knew that Donald Vale was operating from four
5 or five different addresses.

6 Now, supposing that they had made out search warrants
7 for about six of them; four or five addresses, one for his
8 car, one for his person, all simultaneously, and taken them to
9 a Criminal District Court Judge only citing probable cause to
10 believe that this particular warrant would turn up narcotics,
11 and the judge would sign them all.

12 Then they had gone on and executed all these warrants,
13 and in one of them he had found narcotics. It seems to me that
14 the accused, all he had to do was go in and say, "How could
15 you have probable cause for this one warrant, when you got out
16 five others? And you really didn't know where it was; did
17 you?"

18 And no, you didn't. And how do you know where the
19 narcotic evidence is in a case like this where these people are
20 very smart and they jump around and they change where they
21 keep the narcotic hoard: on their person and in the car and
22 different places. So, how would the police ever get it?

23 Q Is this the case in which the record shows that
24 they had habitually used three or four connecting houses?

25 A Not connecting houses, Your Honor. Donald Vale

1 -- this was his mother's and brother's house. He had an
2 apartment of his own; he sometimes stayed at his girl friend's
3 apartment, or a friend's apartment or operated out of an
4 automobile or something. But, he's an intelligent man,
5 enough to know that if he doesn't keep moving and keep his
6 narcotics stock quickly shifting around that he's going to
7 get -- it's going to get seized.

8 Now, are there any other questions the Court would
9 like to ask?

10 MR. CHIEF JUSTICE BURGER: I think none, Mrs. Kornis.

11 MRS. KORNS: Thank you, Your Honors.

12 MR. CHIEF JUSTICE BURGER: Thank you.

13 Mr. Deutsch?

14 REBUTTAL ARGUMENT BY EBERHARD P. DEUTSCH, ESQ.

15 ON BEHALF OF APPELLANT

16 MR. DEUTSCH: Yes, Your Honor, three or four confir-
17 mations in connection, perhaps, primarily with the discussion
18 yesterday.

19 I did make inquiry, Mr. Justice White, as to how long
20 it would take to get a search warrant, because I had no idea
21 of my own. I was told that the ordinary practice in a situa-
22 tion of that sort is for one of the officers to telephone that
23 they are coming down, giving the appropriate information to
24 get the necessary papers ready while they were on their way
25 back, in the daytime while the courts are open.

1 It does take only about 30 minutes to prepare the
2 necessary papers and add to that the time going in and coming
3 back out, would not be more than one hour, for whatever that's
4 worth.

5 Q I think you are posing the optimum circumstances.

6 A Inthe daytime; yes, sir.

7 Q The optimum on a very favorable basis, sir.

8 A There is no question about that; that is the
9 optimum situation.

10 Q It would different operations if you had an
11 Assistant District Attorney there to assist with the prepara-
12 tion of that application to be sure it met the standards laid
13 down by this Court.

14 A I'm not at all certain, Mr. Chief Justice, that
15 a search warrant could be issued in such a case on the type of
16 evidence they have. Now, the statement has been made that
17 there was a narcotics action which had taken place. Actually,
18 no one saw that; they saw what they thought was a narcotics
19 transaction --

20 Q Wouldn't that be the essence of probable cause?
21 It's more probable than not, that people in these circumstances
22 swallowing something on the presence of the officer were
23 swallowing something incriminating.

24 A I am sure that on that alone they would never get
25 a conviction, at least I assume that from reading the

1 newspapers.

2 Q No; we're just talking now about --

3 A About probable cause, and I don't dispute that.
4 I don't dispute the probable cause. I made the statement
5 yesterday that I didn't know, had never seen a search warrant
6 so I couldn't very well speak about it. In the course of
7 checking on that I find that, with one exception in the his-
8 tory of this Court, at least in modern history, no writ of
9 certiorari has ever been issued out of this Court and no one
10 has ever seen one.

11 We're used to using these terms without really
12 realizing what they are. I assume the Judges of this Court
13 have. I was asked yesterday, too, about the question of why
14 a hearing should be granted in this case and it should not
15 have been handled summarily? I assume it is because Mr.
16 Justice Black and Mr. Justice White, while concurring in the
17 grant of certiorari in the two prior cases, decided in June
18 of last year, said that they dissented from the summary --
19 their summary reversal of those cases without a hearing. And
20 that under those circumstances, it was thought best to grant a
21 hearing in one case for the trial.

22 Q Are the two cases you are referring to, the New
23 Jersey case and the California case last June?

24 A Von Clief and Shipley.

25 Q Right.

1 A Now, we rely, of course, on Agnello, James and
2 Shipley in which -- and the statement finally made in Shipley
3 that no one has ever been held -- no search has ever been held
4 to be valid when the arrest was made outside the premises in
5 which the search took place.

6 We submit the case.

7 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Deutsch.
8 Mr. Deutsch, you acted at the request of the Court, by
9 appointment of the Court. We thank you for your assistance
10 to us, and of course, the assistance to your client.

11 MR. DEUTSCH: I'm very grateful for the privilege.

12 MR. CHIEF JUSTICE BURGER: The case is submitted.

13 (Whereupon, at 10:35 o'clock a.m. the argument in the
14 above-entitled matter was concluded)

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