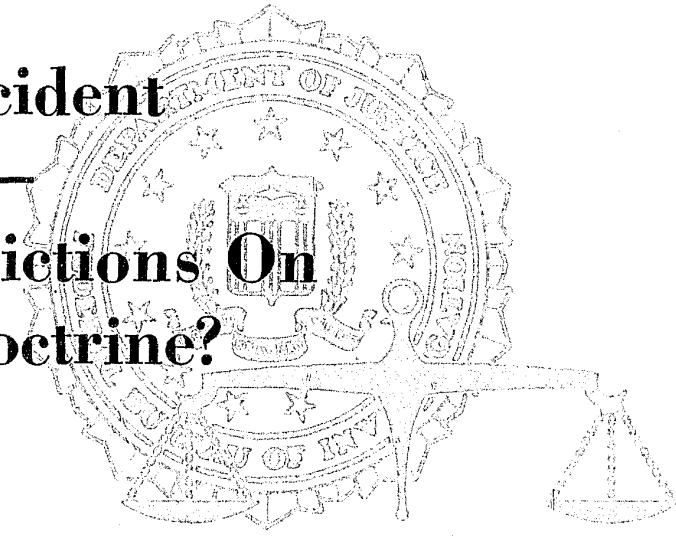
Search Incident To Arrest— New Restrictions On An Old Doctrine?



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A fundamental principle of search and seizure law which has been emphasized frequently in decisions of the U.S. Supreme Court is that police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.[1] Although adherence to this principle has been strictly enforced, "it is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment." [2] The reasons for this exception are quite basic and were identified by the Supreme Court in its landmark decision of *Chimel* v. *California*.[3]

> "When an arrest is made, it is reasonable for the arresting officer to . . . [conduct a search] . . . in order to remove any weapons that the . . . [arrestee] . . . might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and

the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence in order to prevent its concealment or destruction." [4]

The permissible scope of searches incident to arrest has been recognized to involve two distinct levels of intrusion. One is a search of the actual person of the arrestee; the other, a search of possessions within the area of the arrestee's immediate control.[5] There has been little judicial disagreement about the limits of the search of the arrestee's person. It may extend to his body,[6] his clothing,[7] and personal items located on or in his clothing, such as wallets [8] and cigarette packages.[9] Because of the reduced expectation of privacy resulting from a custodial arrest, it has even been held that a search of personal effects which "could be made at the time of arrest may be legally conducted later when the accused arrives at the place of detention." [10]

But the limits of the area search—the permissible area beyond the person of the arrestee which the search may cover—has been subject to different interpretations, and early decisions bearing on it were inconsistent.[11] Since *Chimel,* however, it has generally been understood that an officer may search the "area 'within [the] immediate control' [of the arrestee]—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence." [12] As the *Chimel* opinion noted, "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." [13] The boundary of the area to which this search may extend has been characterized as the "grabbing distance," [14] and some courts have permitted its search even after the arrestee was handcuffed and thus no longer able to "grab," so long as the the search was substantially contemporaneous with the arrest.[15]

Recently, the Supreme Court added another chapter to the continuing problem of defining the permissible limits of a search, incident to arrest, of possessions within the area of an arreste's immediate control. *United States* v. *Chadwick,*[16] decided by the Court on June 21, 1977, contains language which once again may require officers and departments to reexamine existing policies concerning searches incidental to arrest.

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

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The Chadwick Case

In *Chadwick,* Federal narcotics agents in Boston had probable cause to believe that a 200-pound, double-locked footlocker, which had just arrived by rail from San Diego, contained marihuana. They observed Chadwick (and others) remove the footlocker from the train depot and place it in the trunk of the defendants' awaiting auto. While the trunk lid was still open, Chadwick was arrested and the footlocker and its keys seized. The defendant and the footlocker were then transported to the Boston Federal building where, an hour and a half later, the footlocker was searched and large amounts of marihuana located. Chadwick was charged in Federal court with possession of marihuana and conspiracy.

" 'Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest'."

Before trial, the U.S. district judge suppressed the marihuana on the ground a search warrant should have been obtained to search the footlocker. The Court of Appeals for the First Circuit affirmed and the Supreme Court granted *certiorari.*

One of the arguments advanced by the Government to sustain the warrantless search was that it was incidental to a lawful arrest.[17] Mr. Chief Justice Burger, writing for the Court, rejected this argument. In so doing, he acknowledged that searches incident to arrest involve two spheres of intrusion—the search of the actual person of the arrestee, and the search of possessions within his immediate control.[18]

The opinion noted that searches of the "person," and items immediately associated with the person, are justified by a reduced expectation of privacy caused by the arrest. (A decision of the Court 3 years earlier had upheld a warrantless seizure and search of an arrestee's clothing 10 hours after his arrest, partially using this rationale.[19]) However, an arrestee does not suffer a reduction of his expectation of privacy in those items not immediately associated with his person, but which are within the "area" of his immediate control. Their search can be justified only by the immediate need to safeguard the arresting officer and prevent the loss of evidence. This justification disappears when the "search is remote in time or place from the arrest," [20] and the property searched is no longer accessible to the arrestee. Thus:

> "Once law enforcement officers have reduced luggage or other personal property *not immediately associated with the person* of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." [21]

Because the footlocker could not be characterized as property immediately associated with Chadwick's person (thus permitting a delayed search), and because the arresting agents had reduced it to their exclusive dominion (thus making it inaccessible to Chadwick), its search could not be justified as being incidental to the arrest.[22]

Chadwick, of course, has direct application to large, closed objects, such as footlockers, found in the immediate vicinity of an arrestee. But what effect does it have on searches of other personal property? A literal reading of the above-quoted passage from *Chadwick* could be interpreted as saying that now searches of any item found in the immediate "area" of the arrestee will be sustained only if the item searched is one in which there is a "danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." [23] Carried to its extreme, this might even mean that the scope of post-*Chadwick* searches incident to arrest will be restricted to the person of the arrestee only, and will not be extended automatically to the surrounding area. This is possible because in the typical arrest situation, the arresting officer's first and primary concern is to handcuff and secure the arrestee. The search of the immediate area for weapons and evidence, although "substantially contemporaneous" with the arrest, usually follows the arrest and takes place at a time when the arrestee is subdued and no longer a threat to grab a weapon or destroy evidence.

Because *Chadwick* was decided shortly over a year ago, only a few courts have had the opportunity to address the issue it posed. One case which did is *United States* v. *Ester*.[24]

In *Ester*, the defendant was arrested at an airport while standing near his luggage. The luggage was seized and the defendant handcuffed and placed in a government vehicle. His suitcase was searched immediately and heroin located. Later, the defendant moved to suppress the contraband on the theory that the arresting agents had taken "exclusive possession" of his luggage, and under *Chadwick*, the search could be conducted only under the authority of a valid warrant. The Government contended the search was valid incident to arrest and attempted to distinguish *Chadwick* on the basis that *Chadwick* applies only to very large pieces of luggage, and searches

which are remote in time and place from the arrest.

The Court disagreed and ruled that the size of the object searched has little to do with *Chadwick's* applica-

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tion. A warrantless search is invalid once the arresting officers have gained complete control over the item and it is inaccessible to the arrestee. Ester was handcuffed and his suitcase was in the hands of the arresting officers when it was searched. Therefore, the search could not be justified as incident to arrest.[25]

Nor did the Court see any significance in the fact that the search in *Chadwick* occurred 1½ hours after the arrest, and the arrest and search in *Ester* were substantially contemporaneous. "*Chadwick's* requirement of a warrant does not depend on the amount of time or space between the arrest and the search but on the extent to which the property is within the control of the police." [26] The motion to suppress was granted.[27]

Hand-held Items

Chadwick also has the potential for altering the police approach to the search of portable, hand-held items carried by a person at the time of arrest, such as briefcases, purses, and shopping bags. Little doubt existed in the past that such parcels could be searched immediately after arrest.[28] But often an arresting officer would desire to seize the item and search it later, at the station house, to avoid the inconvenience, difficulty, and delay caused by conducting the search at the arrest scene.

Prior to *Chadwick*, most courts which had considered delayed searches had allowed them as incident to arrest. Some justified the searches by characterizing small, portable objects as personal effects, indistinguishable in a constitutional sense, from an arrestee's "suit pockets, or hatband," [29] which the Supreme Court, in an earlier case, had said could be searched "at the station house after the arrest has occurred at another place." [30] Other courts justified delayed searches on grounds ranging from the expediency of not requiring arresting officers "to stand in a public place examining papers or other evidence on the person of the defendant," [31] to a characterization of a delayed search as a continuation of the search initiated at the arrest scene.[32] Other decisions appeared to hinge on a flat reliance on language from the Court's earlier decision in *United States* v. *Edwards:*

> "Once an accused has been lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of arrest may lawfully be searched and seized without a warrant even after a substantial time lapse between the arrest and later administrative processing, on the other hand, and the taking of the property for use as evidence, on the other." [33]

But since *Chadwick*, the limited number of courts which have addressed the issue have spoken in language which indicates that *Chadwick* has imposed a new standard. For example, in *United States* v. *Berry*,[34] Federal agents arrested a bank robbery suspect who was carrying an attache case he had just removed from the trunk of a car. The suspect was searched, handcuffed, and removed from the arrest scene. Eight minutes later another agent searched the attache case and located evidence. Later, Berry was convicted of bank robbery.

In considering the subsequent appeal, the court of appeals noted that although other courts previously had approved similar searches, *Chadwick* teaches that once arresting officers "have reduced luggage or other personal property *not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence," [35] a search cannot be justified as being incident to arrest. Here, the attache case was exclusively controlled by the agents at the time of the search, and was inaccessible to the defendant. Consequently, the search could be sustained as incident to arrest only if the attache case could be characterized as being "immediately associated with the person of the arrestee." "If it [could], the later search could be justified as a search

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of the arrestee's person, which need not be undertaken contemporaneous with the arrest." [36]

The Court, however, ruled that the attache case was not a personal item, but rather a possession within the arrestee's immediate control. In so doing, the opinion contrasted briefcases from other hand-held items, such as purses, which might be considered personal items because they are carried with the person at all times. Berry's attache case was more akin to the footlocker in *Chadwick*, in that the defendant had a high degree of privacy interest in its contents.[37] The warrantless search was, therefore, unreasonable.[38]

Two recent State cases also have rejected searches based on *Chadwick*.

"[A] Missouri Court of Appeals held that a warrantless station house search of an arrestee's triple-locked suitcase, after the defendant had been secured, was invalid under the 'new principle' announced in *Chadwick*."

In *State* v. *Dudley*,[39] a Missouri Court of Appeals held that a warrantless station house search of an arrestee's triple-locked suitcase, after the defendant had been secured, was invalid under the "new principle" announced in *Chadwick*. The opinion noted that searches incident to arrest of the *person* may be delayed to a subsequent time and place, "but searches of other possessions . . . can no longer be conducted after the point when the officers have reduced those possessions to their exclusive control." [40]

And in *State* v. *Dean*,[41] a Court of Appeals of Kansas ruled that evidence found in the search of defendant's overnight case should have been suppressed. The defendant had been arrested in his car after a high-speed chase. Shortly thereafter, he was placed in the custody of another officer and the overnight case was seized from the car, opened, and marihuana located. The Court reasoned that under *Chadwick*, the search could not be sustained because the officers had reduced the case to their exclusive control, and there was no longer a danger of the arrestee gaining access to it to secure a gun or evidence.[42]

Conclusion

The full impact of *Chadwick* will not be known until other courts have had an opportunity to interpret its language. At this juncture, however, it would seem accurate to summarize the scope of searches incident to arrest as follows:

When an individual is arrested, his person and that personal property immediately associated with his person can be searched completely. Because the arrestee retains no significant expectation of privacy in his person or personal effects, the search may be delayed and completed later, at the place of detention. "Were this not to be so, every person arrested for a serious crime would be subjected to a thorough and possibly humiliating search where and when apprehended." [43]

Traditionally, the search also has extended to possessions located in the area immediately surrounding the arrestee. But because an arrest does not lessen an arrestee's expectations of privacy in those possessions, the courts have required that this aspect of the search be carried out contemporaneously with the arrest, inasmuch as its only justification is the immediate need to secure weapons and destructible evidence. In practice, however, most courts have permitted this aspect of the search even after the arrestee was handcuffed and secured, so long as the search was "substantially contemporaneous" with the arrest.

To date, the few post-*Chadwick* decisions on point indicate that the "area" search may no longer be conducted once officers have reduced possessions located in the immediate vicinity of the arrestee to their exclusive control and they no longer are accessible to the arrestee.

Whether small, hand-held items will be characterized as "personal items," or as items located within the "area" of the arrestee's immediate control, is an issue which, apparently, must be decided on the basis of the facts of each case. It can be anticipated, however, that courts will vary greatly in their views on that issue. Thus, officers should consult with their legal advisers or district attorneys for guidance on the treatment of the searches of these articles.

Any luggage or other object of personal property (not immediately asso-

ciated with the person) located in the area of the arrest which is not, or cannot, be searched incident to arrest, may be seized without a warrant if the arresting officers have probable cause to believe that the item contains evidence. However, before a search of the interior or contents is permissible, a search warrant must be obtained. The only exception would be if an exigency exists. Examples might be if the officers had reason to believe that the item seized contained a dangerous instrumentality, such as explosives,[44] or perhaps if the evidence would be destroyed or altered by the passage of time required to obtain a warrant.[45]

FBI

FOOTNOTES

[1] *Terry* v. *Ohio*, 392 U.S. 1 (1968).

[2] *United States* v. *Robinson*, 414 U.S. 218, 224 (1973).

[3] 395 U.S. 752 (1969).

[4] *Id.* at 762, 763.

[5] See *United States* v. *Robinson*, 414 U.S. 218 (1973); *Chimel* v. *California*, 395 U.S. 752 (1969).

[6] *Cupp* v. *Murphy*, 412 U.S. 291 (1973) (fingernail scrapings); *Schmerber* v. *California*, 384 U.S. 757 (1966) (blood sample); *State* v. *Riley*, 226 N.W. 2d 907 (Minn. 1975) (postarrest station house inspection of rape suspect's penis.)

[7] *United States* v. *Edwards*, 415 U.S. 800 (1974).

[8] *United States* v. *Swofford*, 529 F.2d 119 (8th Cir. 1976).

[9] *United States* v. *Robinson*, 414 U.S. 218 (1973); *Gustafson* v. *Florida*, 414 U.S. 260 (1973).

[10] *United States* v. *Edwards*, 415 U.S. 800, 803 (1974).

[11] Compare *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931) (suppressing papers taken from desk and safe), *United States* v. *Lefkowitz*, 285 U.S. 452 (1932) (suppressing items located in desk drawers and cabinet) and *Trupiano* v. *United States*, 334 U.S. 699 (1948) (suppressing illicit distillery seized contemporaneously with defendant's arrest), with *Marron* v. *United States*, 275 U.S. 192 (1927) (allowing incriminating ledger located in closet), *Harris* v. *United States*, 331 U.S. 145 (1947) (admitting items seized in sealed envelope found in desk drawer), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950) (permitting items found in desk, safe, and file cabinets.)

[12] *Chimel* v. *California*, 395 U.S. 753, 763 (1969).

[13] *Id.*

[14] *People* v. *Floyd*, 26 N.Y. 2d 558, 563, 260 N.E. 2d 815, 817 (1970).

[15] See *United States* v. *Dixon*, 558 F.2d 919 (9th Cir. 1977) (paper bag found in defendant's car); *United States* v. *Kave*, 492 F.2d 744 (6th Cir. 1974) (suitcase); *State* v. *Shane*, 255 N.W. 2d 324 (Ia. 1977) (search of bed 2 minutes after arrestee handcuffed); *People* v. *Fitzpatrick*, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973), *cert. denied*, 414 U.S. 1050 (1973) (search of closet after defendant removed from room. In his dissent from the denial of *certiorari*, Mr. Justice White observed that the search of the closet after the removal of the defendant posed "a substantial issue of compliance with *Chimel*.")

[16] 53 L. Ed. 2d 538 (1977).

[17] The prosecution also contended that the validity of searches of personal effects seized outside the home should depend on whether probable cause exists, not whether a warrant has been obtained. The Court rejected this argument as being without historical basis and noted that the warrant clause of the fourth amendment safeguards an individual's expectation of privacy, inside and outside the four walls of a residence. By placing personal effects in a double-locked footlocker, Chadwick manifested an expectation of privacy, thus making a warrantless search (absent an exigency) unreasonable. See *Id.* at 548. Next, the Government asserted that the "automobile exception," first articulated in *Carroll* v. *United States*, 267 U.S. 132 (1925), justified the warrantless intrusion into the footlocker. Although it conceded some similarities between vehicles and footlockers (both are "effects" and both are mobile), the Court distinguished the two on the basis of the diminished expectation of privacy which surrounds the automobile. A vehicle differs greatly from luggage in that a vehicle's interior usually is exposed to public view, its purpose is transportation, not the repository of personal effects, and it is subject to numerous State licensing and inspection requirements. These factors greatly reduce an owner's expectation of privacy in his vehicle. Thus once an automobile has been seized on probable cause, an immediate search is no greater intrusion on the rights of the owner than the indefinite immobilization required to obtain a warrant. But because of the high expectation of privacy Chadwick maintained in the footlocker, a search of its interior could be reasonable only under the authority of a search warrant. *Chadwick*, *supra* at 549, 550.

[18] See *Chadwick*, *supra* at 551 n. 10.

[19] See *United States* v. *Edwards*, 415 U.S. 800, 808–809, in which Mr. Justice White, quoting *United States* v. *DeLeo*, 422 F.2d 487, 493 (1st Cir. 1970), *cert. denied*, 397 U.S. 1037 (1970) stated: " . . . while the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." See also *United States* v. *Robinson*, 414 U.S. 218, 237–238 (1973) (Powell, J., concurring).

[20] *Chadwick*, *supra* at 550, 553, quoting *Preston* v. *United States*, 376 U.S. 364, 367 (1964).

[21] *Chadwick*, *supra* at 551 (emphasis added).

[22] There is some doubt as to whether the search would have been permissible even if conducted at the time and place of the arrest. Because the footlocker was heavy and securely locked, it might be argued that it was not immediately accessible to Chadwick. See *Chadwick*, *supra* at 552 n.2 (Brennan, J., concurring).

[23] *Id.*, at 551.

[24] 442 F.Supp. 736 (S.D.N.Y. 1977).

[25] The Court did concede that smaller possessions, simply because of their size, might be more accessible to a defendant, even after arrest, and thus may be subject to warrantless searches. *Id.* at 739.

[26] *Id.*

[27] On a motion to reargue, the Court ruled that *Chadwick*, "which narrowed the scope of the search-incident-to-arrest exception," *id.* at 741, should not be applied retroactively. The search was then held invalid on other grounds.

[28] See *United States* v. *Santana*, 427 U.S. 38 (1976) (narcotics found in paper bag); *Draper* v. *United States*, 358 U.S. 307 (1959) (narcotics paraphernalia located in zipper bag); Fisher, *Search and Seizure*, sec. 107 (1970).

[29] *United States ex rel. Muhammad* v. *Mancusi*, 432 F.2d 1046, 1048 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971) (upholding warrantless search of briefcase at FBI office incident to earlier arrest).

[30] *United States* v. *Edwards*, 415 U.S. 800, 803 (1974).

[31] *United States* v. *Gonzalez-Perez*, 426 F.2d 1283, 1287 (5th Cir. 1970).

[32] See *People* v. *Campbell*, 367 N.E. 2d 949 (Ill. 1977).

[33] *United States* v. *Battle*, 510 F.2d 776, 779 (D.C. Cir. 1975) (station house search of shopping bag seized from defendant at arrest), quoting *United States* v. *Edwards*, 415 U.S. 800, 807 (1974).

[34] 560 F.2d 861 (7th Cir. 1977).

[35] *Chadwick*, *supra* at 551 (emphasis added).

[36] *Berry*, *supra* at 863.

[37] It might be argued that briefcases are distinguishable from suitcases and other larger items or baggage. As noted in *Chadwick*, important fourth amendment privacy interests are implicated when personal effects are placed inside locked luggage. People have a reasonable "expectation that the contents [will] remain free from public examination." *Chadwick*, *supra* at 549. Hand-held items such as briefcases, however, might not implicate the same degree of privacy expectation because their contents may be exposed to public view. For example, the interior of one's briefcase might be viewed by coworkers at a business office, or fellow travelers on a bus or plane. Additionally, hand-held items are subject to routine inspections when carried into court rooms and certain government buildings, and when boarding commercial aircraft.

[38] The Court later vacated its judgment and affirmed Berry's conviction on the ground that *Chadwick* should not be given retroactive effect. *United States* v. *Berry*, 571 F.2d 2 (7th Cir. 1978). (The *Berry* search occurred prior to the Supreme Court's decision in *Chadwick*.) Interestingly, the fact the court of appeals sustained the search on this ground lends support to the belief that *Chadwick* articulated a new standard. At least two other Federal courts of appeal have ruled that *Chadwick* is not retroactive. See *United States* v. *Reda*, 563 F.2d 510 (2d Cir. 1977); *United States* v. *Montgomery*, 558 F.2d 311 (5th Cir. 1977).

[39] 561 S.W.2d 403 (Mo. Ct. App. 1978).

[40] *Id.* at 406.

[41] 574 P.2d 572 (Kans. Ct. App. 1978).

[42] Another Federal case in point is *United States* v. *Schleis*, 543 F.2d 59 (8th Cir. 1976), in which the Court of Appeals for the Eighth Circuit upheld a warrantless station house search of an arrestee's locked briefcase, after the arrestee had been placed in custody. The defendant appealed this ruling and the Supreme Court granted *certiorari*. However, on June 27, 1977, 6 days after its decision in *Chadwick*, the Court vacated the judgment of the court of appeals and remanded the case for further consideration in light of *Chadwick*. 53 L.Ed.2d 1089 (1977).

[43] *United States* v. *DeLeo*, 422 F.2d 487 (1st Cir. 1970), *cert. denied*, 397 U.S. 1037 (1970).

[44] *Chadwick*, *supra* at 551 n.9.

[45] See *Schmerber* v. *California*, 384 U.S. 757 (1966). Another possibility which had received some judicial support prior to *Chadwick*, is an inventory theory similar to that applied by the Court to vehicles in *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). See *United States* v. *Friesen*, 545 F.2d 672 (9th Cir. 1976) (inventory of suitcases), and *United States* v. *Giles*, 536 F.2d 136 (6th Cir. 1976) (inventory of baggage). However, the fact that this rationale was not used by the Court to justify the search of the footlocker, and the fact that luggage can be safeguarded more easily than impounded vehicles, militates against use of this theory.

END