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Constitutional Law--Evidence--Evidence Illegally Seized by State Officers Held Inadmissable in State Court (Mapp v. Ohio, 367 U.S. 643 (1961))

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of a customer. . . ." [38] Thus Sun, to retain its customer, McLean, was entitled to the defense.

The Court is careful to note the particular circumstances of this case, *viz.*, the make-up of the gasoline industry in general and the vertical integration [39] of Super Test in particular, but it seems that the well-reasoned opinion has provided at least two basic rules of construction concerning the applicability of section 2(b), which go beyond the bare facts of the decision. First, courts are not to adhere to a strict, literal interpretation of the wording contained in the defense. Instead, they are to look to the individual competitive situations and be bound rather by the spirit of the law and the overall national policy which fosters the competitive process. Secondly, the tribunals must be careful to keep in mind the economic realities of the market place: to realize, for example, that sellers of competing products may be very much in competition with each other even though they do not sell to the same retailers.

While the Court's dismissal of the *Enterprise* restriction clearly seems warranted in the *Sun Oil* case, the conclusion of the Fifth Circuit cannot be applied arbitrarily to any competitive situation so as to permit every seller to go to the aid of a struggling customer. The Robinson-Patman Act still forbids unwarranted favoritism among customers, and despite its numerous shortcomings, it remains the law. The present case, however, is perhaps an indication that a more realistic application of its sections will be forthcoming.

CONSTITUTIONAL LAW—EVIDENCE—EVIDENCE ILLEGALLY SEIZED BY STATE OFFICERS HELD INADMISSIBLE IN STATE COURT.—On May 23, 1957 Cleveland police officers sought admittance to the Mapp home in search of a suspected criminal and "policy paraphernalia" believed hidden there. Miss Mapp refused them entrance without a warrant. Some hours later the police returned and forced their way into the Mapp home. When asked for a warrant they produced a piece of paper which Miss Mapp never had an opportunity to examine. She was then handcuffed and the house searched. During this search the police uncovered certain obscene material, for possession of which the appellant was

[38] Standard Oil Co. v. FTC, 340 U.S. 231, 242 (1951).

[39] Super Test's integration resulted in a competitive situation wherein a supplier-retailer was pitted against a supplier.

convicted. At the trial the "warrant" was never produced and on review the Supreme Court of Ohio found that the evidence was obtained by an illegal search and seizure but refused to overrule the conviction.

The United States Supreme Court reversed this decision, *holding,* that evidence gained by an illegal search and seizure was inadmissible in a state prosecution, thus overruling the case of *Wolf v. Colorado.*[1] *Mapp v. Ohio,* 367 U.S. 643 (1961).

In 1886, in *Boyd v. United States,*[2] the Supreme Court reversed a conviction based on evidence which the defendant was compelled to produce. It reasoned that the fourth amendment's protection against "illegal search and seizure" and the fifth amendment's protection against "self-incrimination" *together* barred the use of such evidence. Nineteen years later, the soundness of this proposition was questioned in a dictum statement in *Adams v. New York* [3] where the Court expressed the opinion that the fourth and fifth amendments were never intended to have the effect given them in *Boyd.*[4] It was not until 1914 in *Weeks v. United States* [5] that the Court adopted the so-called exclusionary rule by squarely holding that evidence seized in violation of the fourth amendment was inadmissible in a criminal prosecution, at least in the federal courts.[6]

The scope of the exclusionary rule as applied in the federal area was left to be defined by later cases. Thus, knowledge gained as a result of an "illegal search and seizure" was held to be barred in *Silverthorne Lumber Co. v. United States.*[7] And, when the seizure was made under the guise of a "friendly visit," [8] or when federal officers were admitted to the defendant's house by one falsely claiming to have such authority,[9] evidence so gained was also excluded. Finally in 1959 the Court in *Elkins v. United*

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[1] 338 U.S. 25 (1949).

[2] 116 U.S. 616 (1886). It appears that the opinion of the Court in this case was against the accepted weight of authority. See 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961).

[3] 192 U.S. 585 (1904) (dictum).

[4] *Id.* at 598.

[5] 232 U.S. 383 (1914).

[6] *Ibid.* The reasoning of the Court was that "if letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secured against such searches and seizures is of no value, and, so far as those thus are concerned, might as well be stricken from the Constitution." *Id.* at 393.

[7] 251 U.S. 385 (1920). In this case evidence illegally seized was returned to its owner, but the government, acting on knowledge gained through the seizure, then properly acquired this evidence by a search warrant. However, the Court denied its admission.

[8] Gouled v. United States, 255 U.S. 298 (1921).

[9] Amos v. United States, 255 U.S. 313 (1921).

States[10] ruled that evidence illegally seized by state officers was inadmissible in federal prosecutions, thereby overruling the "Silver-platter Doctrine."[11]

There must, however, be an illegal search and seizure in order for the exclusionary rule to operate. For example, where federal officers trespassing on the defendant's land witnessed him committing an illegal act, their testimony regarding this act was not such evidence as would be barred by the rule.[12] It was in this frame of reference that the Court in *Olmstead v. United States*[13] held wiretapping not to be a search and seizure within the meaning of the fourth amendment, and evidence so gained admissible.

Insofar as state prosecutions are concerned the exclusionary rule has been, up to now, cautiously and narrowly applied. *Rea v. United States*[14] prohibited federal officers from turning illegally seized evidence over to state officials. But the Court had previously refused to extend the exclusionary rule to purely state action in *Wolf v. Colorado*.[15] The holding there was that the core of the fourth amendment, that is, the right of privacy, was basic to ordered liberty and therefore applied to the states through the "due process" clause of the fourteenth amendment. But, after considering the opinions of the states which refused to accept the rule, it concluded that the rule was not an essential ingredient of the right of privacy and refused to apply it to the states.[16]

The Court, in the instant case, by reviewing the *Wolf* decision, was faced with the question of whether or not the exclusionary rule was implicit in the concept of ordered liberty so as to apply to the states through the "due process" clause. After an analysis of the *Wolf* reasoning the majority concluded that the decision was based on the factual considerations of not wishing to brush aside the experience of two-thirds of the states, which rejected the rule, and on the fact that there were "other means" of enforcing the right of privacy.[17] The majority contended that these reasons were not relevant to a finding that the "rule" was an essential ingredient of ordered liberty,[18] but they considered their current validity. They reasoned that these considerations were no longer

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[10] 364 U.S. 206 (1960).

[11] The import of this "doctrine" was that evidence taken by state officers in violation of the fourth amendment could be used in federal prosecutions. For a full discussion of the *Elkins* decision, see 35 ST. JOHN'S L. REV. 139 (1960).

[12] Hester v. United States, 265 U.S. 57 (1924).

[13] 277 U.S. 438 (1928).

[14] 350 U.S. 214 (1956).

[15] 338 U.S. 25 (1949).

[16] *Id.* at 28-33.

[17] Mapp v. Ohio, 367 U.S. 643, 650-53 (1961).

[18] *Id.* at 651.

valid,[19] since the experience of the states had changed (only one-half of them now opposing the rule), and since the "other means" had failed to protect the right of privacy (citing California's reasons for adopting the exclusionary rule [20] as an example).

After rejecting the reasoning of the *Wolf* Court, the majority considered the constitutional basis of the exclusionary rule. Reviewing the prior statements of the Court in *McNabb v. United States,*[21] *Olmstead v. United States,*[22] and *Byer v. United States* [23] the majority concluded that the constitutional origin of the rule was well founded and that it was not a mere rule of evidence for the federal judiciary.[24]

Having thus met the arguments against applying the rule they proceeded to argue for its application. Combining the reasoning of *Weeks* to the effect that the rule was essential to the protection of the fourth amendment, and the reasoning of *Wolf* that the right of privacy was essential to ordered liberty, the majority concluded that "without that rule the freedom from state invasions of privacy would be so ephemeral . . . as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.' " [25] Paraphrasing *Weeks,* the Court concluded that the right of privacy without the rule would be a mere "form of words." [26]

The dissent objected to the majority opinion on two grounds. First, because the "pivotal" issue raised by the briefs and answered in the Ohio Supreme Court had been the constitutionality of the statute under which Miss Mapp was convicted. Hence, the application of the exclusionary rule was only a minor issue.[27] Therefore, it appeared to the dissent that the majority had reached out to overrule *Wolf,* in contradiction of the principle that the Court will answer constitutional questions only when squarely faced with them.[28] Secondly, they took issue with what they viewed as the majority logic that because the core of the fourth amend-

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[19] *Id.* at 650-53.

[20] People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). See also, Note, *Two Years With the Cahan Rule,* 9 STAN. L. REV. 515 (1957).

[21] 318 U.S. 332, 339-40 (1943) (dictum).

[22] 277 U.S. 438, 462 (1928) (dictum).

[23] 273 U.S. 28, 29-30 (1927).

[24] Mapp v. Ohio, *supra* note 17, at 649-50.

[25] *Id.* at 655.

[26] *Ibid.* A similar conclusion was reached by the Court in *Elkins v. United States,* 364 U.S. 206, 217 (1959).

[27] It should be noted that the Ohio court spent a considerable portion of its opinion disposing of the issue of illegally seized evidence before it questioned the constitutionality of the statute. State v. Mapp, 170 Ohio St. 427, 430, 166 N.E.2d 387, 389 (1960).

[28] Mapp v. Ohio, 367 U.S. 643, 672-77 (1961) (dissenting opinion).

ment applied to the states, the exclusionary rule must also apply.[29] Emphasizing that *Wolf* held the core and not the body of the fourth amendment applicable to the states and that the fourteenth amendment is not shorthand for the first eight amendments, they concluded that the majority had not demonstrated that the exclusionary rule was more than a configuration of the fourth amendment. In not so demonstrating, the dissent felt that the Court could not apply the rule by way of the "due process" clause and that the majority was imposing a federal rule on the states for the sake of uniformity.[30]

If the argument of the majority was that the exclusionary rule applied to the states because it is a configuration of the fourth amendment, the criticism of the dissent would be justified. It appears, however, that the majority has concluded that the right of privacy has no meaning without the rule, and therefore the rule is necessary to ordered liberty. The majority argument then is that the exclusionary rule applies to the states because it is essential to due process, and not simply because it is part of the fourth amendment.

By this decision the Court has overruled the opinions of some twenty-four states.[31] In 1926, when faced with this problem in *People v. Defore*,[32] the New York Court of Appeals viewed it as one of competing interests. "On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office." [33] In attempting to balance these interests the court rejected the federal exclusionary rule as one bereft of consistency. It concluded that admission of the evidence and the imposition of other sanctions against the illegal search would best serve both interests. However, in considering such "other sanctions" as civil actions against the police or a criminal proceeding against the officer who made the search, the majority, in the instant case, concluded that those methods were ineffectual.[34]

The import of this decision, however, is not its expression

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[29] *Id.* at 678 (dissenting opinion).

[30] *Id.* at 682-83 (dissenting opinion).

[31] For a complete list of the decisions of the states which rejected the rule, see Berman and Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems,* 55 NW. U.L. REV. 525, 532 n.39 (1960).

[32] 242 N.Y. 13, 150 N.E. 585 (1926).

[33] *Id.* at 24-25, 150 N.E. at 589. For similar conclusions, see also State v. Reynolds, 101 Conn. 224, 235-36, 125 Atl. 636, 638-39 (1924); Eleuteri v. Richman, 26 N.J. 506, 511-12, 141 A.2d 46, 49-50 (1958).

[34] Similar conclusions were drawn by Justice Murphy in his dissent in Wolf v. Colorado, 338 U.S. 25, 41-44 (1949). See also People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12, 50 A.L.R.2d 513, 521-22 (1955).

of dissatisfaction with the remedial methods of the states for enforcing the right of privacy. Rather it is to impose upon the states a procedure which to a greater extent should prevent the breach of the right in the first place. It is this interest in preventing the breach of the right rather than giving a sufficient remedy that is at the heart of this decision. The majority may well be correct in concluding that unless the breach of the right of privacy can be prevented, then the right itself is a nullity.

It will be for future cases to decide whether the totality of federal case law on the exclusionary rule will also apply to the states. Several of the states which had accepted the rule prior to the instant case had exceptions to its application.[35] The effect of this decision on such state law is doubtful, but it would seem that, rather than apply the totality of federal law, the Court will decide each case in relationship to the test applied in the instant case—does it conform to the requirements of due process.

CRIMINAL LAW—APPEALS—POOR PERSON'S APPEAL FROM DENIAL OF HABEAS CORPUS REFUSED WHERE ISSUES HAD PRIOR ADEQUATE REVIEW.—Defendant filed notice of appeal from the county court's denial of his writ of habeas corpus but took no further steps to perfect it, instead appealing from the conviction to the Appellate Division and attacking the judgment on the same grounds he had relied upon in the habeas corpus proceeding. The conviction was affirmed by both the Appellate Division and the Court of Appeals. Defendant then moved for leave to have appeal from the habeas corpus denial heard as a "poor person." The motion was denied, and the appeal dismissed. From this dismissal defendant appealed to the Court of Appeals which *held* that where it appears from either the moving papers or the court's own records that the question sought to be reviewed in a post-conviction hearing has already been passed upon, the indigent defendant may not prosecute the appeal at public expense, "adequate appellate review" having been granted. *People v. Martin*, 9 N.Y.2d 351, 174 N.E.2d 475, 214 N.Y.S.2d 370 (1961).

"[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review," [1] but if provided,

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[35] For example, South Dakota and Wisconsin refuse to supress evidence because of technical irregularities in the search warrant. S.D. CODE § 34.1102 (Supp. 1960); WIS. STAT. ANN. § 963.08 (1958).

[1] Griffin v. Illinois, 351 U.S. 12, 18 (1956).