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10-1-1961

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Recommended Citation

Carey A. Randall, *State Courtroom Doors Closed to Evidence Obtained by Unreasonable Searches and Seizures*, 16 U. Miami L. Rev. 132 (1961)
Available at: http://repository.law.miami.edu/umlr/vol16/iss1/11

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death statute in lieu of the FDHSA. But this interpretation could only increase the probability that a New York court in hearing the case would infringe on the substantive rights accorded by the FDHSA. Why then should a New York tribunal not be allowed to sit as a procedural enforcement medium in judgment of the case under the FDHSA? The only conclusion which can be reached is that neither the available legislative history, nor a logical interpretation of the act, appear to demand an admiralty forum. Representative Mann, who propounded the amendment which struck from the act the provision that state jurisdiction would be unaffected only as to causes of action accruing within a state's territorial limits, expressed his doubts as to where jurisdiction would lie under the act;[25] and in fact some 250 members of the House who voted on the amendment were not present when the discussion on the floor took place.[26] No words in the act demand an admiralty forum. It is submitted that the question in each case should be whether the substantive rights and liabilities which accrued to the parties on the happening of the event in litigation will be enforced by recourse to the procedure of the non-admiralty court in which the suit is filed. It must be remembered that if suit is brought under the FDHSA in a non-admiralty court, one substantial difference which will be present is the possibility of resort to a jury trial. It has been argued that the complexities of an admiralty case are too great to be sifted and weighed intelligently by a jury.[27] Whether this or any other factor will serve to subvert the substantive rights of the FDHSA is a question that may be settled only by the Supreme Court.

JAMES H. SWEENY, III

STATE COURTROOM DOORS CLOSED TO EVIDENCE OBTAINED BY UNREASONABLE SEARCHES AND SEIZURES

The petitioner was convicted in a state court of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of a state law.[1] The

25. "[M]y impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court." 59 CONG. REC. 4484 (1920).

26. See 59 CONG. REC. 4486 (1920).

27. Smith, *Jury Trials for Admiralty Cases? No!* 2 FED. B. NEWS 49 (1954).

1. OHIO REV. CODE ANN. § 2905.34 (Baldwin 1958). The statute provides in pertinent part that: "No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book, [or] . . . picture . . . ."

evidence which led to her conviction had been obtained during an illegal search of her home by police officers. The Ohio Supreme Court upheld the conviction because the evidence had not been taken from the defendant's person "by the use of 'brutal or offensive' physical force . . . ."[2] *Held*, reversed: all evidence obtained by searches and seizures in violation of the fourth amendment to the Constitution is, by virtue of the fourteenth amendment due process clause, inadmissible in a state court. *Mapp v. Ohio*, 81 Sup. Ct. 1684 (1961).

For many years, courts generally held that the admissibility of evidence was not affected by the illegality of the means through which the evidence was obtained.[3] The federal exclusionary rule had its origin in 1886 as obiter dictim in *Boyd v. United States*.[4] *Weeks v. United States*[5] firmly established the rule that barred the admission in federal criminal prosecutions of evidence obtained by federal agents in violation of the defendant's rights under the fourth amendment. Decisions since *Weeks* have strengthened the force of the ruling.[6] The exclusionary rule gained additional strength in 1960 with the discarding of the "silver platter" doctrine.[7] In *Elkins v. United States*,[8] the Court held that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment was inadmissible over the defendant's timely objection in a federal criminal trial.[9]

In 1949, in the leading case of *Wolf v. Colorado*,[10] the Supreme Court held that a conviction by a state court for a state offense did not deny the due process of law required by the fourteenth amendment, solely

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2. Ohio v. Mapp, 170 Ohio St. 427, 430, 166 N.E.2d 387, 389-90 (1960). Four of seven judges were of the opinion that the section of the code under which she was convicted was unconstitutional. OHIO CONST. art. IV, § 2 provides that: "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void." The court stated that a "reasonable argument" could be made that the conviction should be reversed because the methods used to obtain the evidence "were such as to 'offend a sense of justice,'" but it did not find this fact determinative.
3. 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).
4. 116 U.S. 616 (1886). The Supreme Court, in Adams v. New York, 192 U.S. 585 (1904), seemingly repudiated the views expressed in *Boyd*, and apparently approved the prevailing state or common law view.
5. 232 U.S. 383 (1914).
6. Rios v. United States, 364 U.S. 253 (1960); Elkins v. United States, 364 U.S. 206 (1960); Rea v. United States, 350 U.S. 214 (1956); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). See also, Jones v. United States, 362 U.S. 257 (1960); Abel v. United States, 362 U.S. 217 (1960); Giordenello v. United States, 357 U.S. 480 (1958); Walder v. United States, 347 U.S. 62 (1954); United States v. Jeffers, 342 U.S. 48 (1951); United States v. Lefkowitz, 285 U.S. 452 (1932).
7. Elkins v. United States, 364 U.S. 206 (1960).
8. *Ibid.*
9. See 15 U. MIAMI L. REV. 318 (1961).
10. 338 U.S. 25 (1949).

because the evidence was obtained in violation of the fourth amendment's prohibition against unreasonable searches and seizures. The Court agreed that the prohibition of the fourth amendment against unreasonable searches and seizures was enforceable against the states through the due process clause of the fourteenth amendment.[11] The Court stated, however, that the constitutional prohibition did not require that it be enforced by prohibiting the use of evidence obtained in violation of it.[12]

The common-law rule that the admissibility of evidence is not affected by the illegality of the means by which it was obtained has had strong support.[13] Conversely, the exclusionary rule forbidding the use of this evidence has been adopted in a number of states[14] and has not lacked advocates.[15]

The majority opinion in *Mapp v. Ohio*,[16] in overruling *Wolf v. Colorado*,[17] relied to a surprising degree upon the rationale of the Court in *Wolf*. After reciting at length the development of the federal exclusionary rule (in federal trials) in the *Boyd* and *Weeks* cases, the opinion stated that the use of illegally obtained evidence involved a denial of the constitutional rights of the accused. It was emphasized that the protection of the fourth amendment against searches and seizures is of no value if the information secured can be utilized against the accused. The majority viewed the action of the Court in *Wolf* as a decision that the exclusionary rule *would* not then be imposed upon the states rather than a decision that the rule *could* not be imposed.[18]

Mr. Justice Clark regarded the failure in the past to apply the exclusionary rule to the states in marked contrast to the action of the Court in other areas of human rights. The Court has not hesitated to enforce, as strictly against the states as it does against the federal government, the rights of free speech and of a free press, the right to a fair public trial and the right not to be convicted through use of a coerced confession.[19]

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11. *Id.* at 28.
12. *Id.* at 27-29.
13. The leading state case rejecting the exclusionary rule was decided in 1926 when Justice (then Judge) Cardozo wrote the opinion in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). He reasoned that the result of the exclusion of such evidence would be that "the criminal is to go free because the constable has blundered." Dean Wigmore has deemed the exclusionary rule as "misplaced sentimentality." 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).
14. For the status prior to *Mapp v. Ohio* of the rule governing admissibility of evidence obtained by unlawful search and seizure see Annot., 50 A.L.R.2d 531 (1956); 8 WIGMORE, EVIDENCE § 2184(a) (McNaughton rev. 1961).
15. Judge Learned Hand in United States v. Pugliese, 153 F.2d 497, 499 (2d Cir. 1945), stated: "Only in case the prosecution which itself controls the seizing officials, knows that it cannot profit by their wrong, will that wrong be repressed." Atz v. Andrews, 84 Fla. 43, 94 So. 329 (1922); MCCORMICK, EVIDENCE 281-98 (1954). See also, Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L.J. 259 (1960).
16. 81 Sup. Ct. 1684 (1961).
17. 338 U.S. 25 (1949).
18. Mapp v. Ohio, 81 Sup. Ct. 1684, 1689 (1961).
19. *Id.* at 1692.

Finally, the majority expressed the view that the double standard that has existed in the past tends to destroy the entire constitutional system of restraints upon which the liberties of the people rest. Since the fourth amendment's right of privacy has been declared enforceable against the states, it is enforceable by the same sanction of exclusion as is used against the federal government in federal trials.[20]

Mr. Justice Harlan, speaking for the minority, expressed the view that the exclusionary rule was only a remedy which, by penalizing past official misconduct, was aimed at deterring this conduct in the future.[21] The Court, by its action in the present case, is imposing upon the states not only the federal substantive standards of search and seizure but also the federal penalties for violation of those standards. The dissenters disagreed with the view that the fourteenth amendment empowers the Court to develop standards and procedures of judicial administration within the judicial systems of the states. The remedies within the judicial system for state courts rest with the highest courts of the states, and the Supreme Court should restrict its supervision to the judicial system over which it presides.[22]

Those who have supported the enforcement of rights guaranteed under the fourth amendment as of equal importance to the enforcement of other constitutional guarantees will be encouraged by *Mapp*. The effect upon law enforcement agencies cannot be ignored. Police officers must now obtain a search warrant before searches if they wish to use the evidence obtained thereby. However, problems confronting the local police officer are by nature complicated and often require prompt police action. The decision in *Mapp* will force courts to free criminals who might have been convicted under previous procedures.

The retroactive effect of the decision cannot be forecast from the opinion. Will there be a demand for the release of those who have been convicted in trials where evidence, now constitutionally inadmissible, was admitted?[23] There is an analogy here to the invalidation of a criminal

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20. *Id.* at 1691.
21. *Id.* at 1705.
22. *Id.* at 1706. The minority pointed out that Mr. Justice Black was unwilling to subscribe to the view that the *Weeks* exclusionary rule derives from the fourth amendment itself, but joined the majority opinion on the premise that its end result could be achieved by bringing the fifth amendment to the aid of the fourth. For the separate concurring opinion of Mr. Justice Black, see *Id.* at 1694-98. The minority opinion also expressed the view that the Court "reached out" to overrule *Wolf*, thereby choosing the more difficult and less appropriate of the two constitutional questions posed by the case. *Id.* at 1702.
23. The action of the Court as to whether a decision is to be applied retroactively or prospectively is by no means uniform. See the concurring opinion of Mr. Justice Frankfurter in Griffin v. Illinois, 351 U.S. 12 (1956); FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE (1935); Annot., 167 A.L.R. 517 (1945).

statute. The question cannot be answered finally until a case reaches the Supreme Court.[24]

The most important question is the extent to which *Mapp* portends other changes in the procedures of state courts in criminal trials.[25] Is uniformity of state and federal procedure to become a substantive right guaranteed under the Constitution? Will the Court use the criteria of the federal court system (*i.e.*, the sixth amendment standard) to judge the adequacy of a state's measures that govern the rights of an accused to counsel?[26] Certainly alert counsel, relying upon *Mapp*, will press these and similar questions.[27] The fact that less than a majority of the Court agreed upon the rationale of this opinion makes an estimate of the future actions of the Court in this area difficult.

CAREY A. RANDALL

24. One court has interpreted *Mapp's* application as prospective only. People v. Figueroa, 220 N.Y.S.2d 131 (Kings County Ct. 1961).
25. Bolger v. Cleary, 293 F.2d 368, 370 (2d Cir. 1961): "The scope of Mapp is, however, unclear in several regards, such as its application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission."
26. McNeal v. Culver, 365 U.S. 109 (1961).
27. People v. Tyler, 14 Cal. Rptr. 610 (Dist. Ct. App. 1961). The court found nothing in *Mapp* to indicate that the states are bound to follow the federal requirements of reasonable and probable cause instead of their own.