Kentucky Law Journal

Volume 11 | Issue 4 Article 6

1923

The Admissibility of Evidence Obtained by Illegal Search and Seizure

G. W. Meuth

THE ADMISSIBILITY OF EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE.

The common law rule regarding the admissibility of evidence is that courts will not inquire into how the evidence was obtained, once it has been presented; that is, the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain it.[1] In *Legatt* v. *Tallervey,* an officer without authority, gave a copy of a record to another which was later introduced as evidence. Lord Ellenbrough said, "It is very clear that it is the duty of the officer, charged with the custody of the records of the Court, not to produce a record but upon competent authority.—But if the officer shall, even without authority, have given a copy of a record, or produced the original, and that is properly proven in evidence, I cannot say that such evidence shall not be received."[2]

Dean John H. Wigmore in the August number of the "American Bar Association Journal," p. 479 concludes that the illegality of the means by which the evidence was procured does not affect its admissibility. The case of *Stevison* v. *Earnest* and *Williams* v. *State* are cited.[3] In *Stevison* v. *Earnest, Schofield, J.,* said that "it is contemplated, and such ought ever to be the fact, that the records of the Court remains permanently in the places assigned by the law for their custody. It does not logically follow, however, that the records, being obtained, cannot be used as instruments of evidence; for the mere fact of (illegally) obtaining them does not change that which is written in them . . . . Suppose the presence of a witness to have been procured by fraud or violence, while the party thus procuring the attendance of the witness would be liable to severe punishment, surely

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[1] Bishop Atterbury's Trial (1723) 16 How. St. Tr. 495; *Jordan* v. *Lewis* (1740), 14 East 306; *Caddy* v. *Barlow* (1827), 1 Man. & Ry. 275; *Jackson* v. *State* (Ga. 1903), 45 S. E. 604; *Chicago* v. *DiSalvo,* 302 Ill. 85. In this case a revolver was held in violation of a city ordinance, which was procured by the officer without a search warrant from the person holding it. This evidence was admissible. *Gindart* v. *People* (1891), 27 N. E. (Ill.) 1085. Jewelry taken from room by an officer without a search warrant was admitted as evidence. *Lawrence* v. *State,* 103 Md. 17; *Commonwealth* v. *Dana* (1841), 2 Metc. (Mass.) 329.

[2] *Legatt* v. *Tallervey,* 14 East 302.

[3] *Stevison* v. *Earnest* (1875), 80 Ill. 513; *Williams* v. *State* (1897) 100 Ga. 511; also see *State* v. *Madison,* 23 S. D. 584; *Younger* v. *State,* 80 Neb. 201; *People* v. *Campbell,* 160 Mich. 108; *People* v. *LeDoux,* 155 Cal. 535; *State* v. *Wilkins,* 72 Or. 77, and *State* v. *Sutter,* 71 W. Va. 371.

that could not be urged against the competency of the witness. If he could not, why shall a record, although illegally taken from its proper place of custody and brought to the Court, but otherwise free from suspicion, be held incompetent?''

In *Williams* v. *State,* Lumpkin, P. J., said, "as we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable search and seizures, was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the constitution of the United States and of this and other States merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify, or declare lawful, any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. From the misconduct of private persons, acting upon their individual responsibility, and of their own volition, surely none of these divisions of government is responsible. If an officer, or a mere petty agent of the state, exceeds or abuses the authority with which he is clothed, he is to be deemed as acting, not for the State, but for himself only; and therefore he alone and not the State, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a mere individual, the most that any branch of the government can do is to afford the citizen such redress as is possible, and bring the wrongdoer to account for his unlawful conduct—whether or not prohibiting the Courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable search and seizure, and thus tend towards the preservation of the citizen's constitutional right to immunity therefrom is a matter for legislative determination.''[3]

On this question there are two lines of authorities one holding that evidence secured by means of a search and seizure within

itself unlawful is not rendered inadmissible by reason of this fact,[4] which is in conformity with the view expressed above.

While the other line of authorities including the United States Supreme Court, holds that evidence received by illegal search and seizure is not admissible. In *Boyd* v. *United States*, the court held: "That a compulsory production of a party's books and papers to be used against himself or property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the fourth amendment and that a seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself; and in a prosecution for a crime, penalty or forfeiture is equally within the prohibition of the fifth amendment."[5]

While the general rule as expressed by the various state decisions is, that evidence received by illegal search and seizure is admissible, there are some state jurisdictions which hold that such evidence is not admissible. In Vermont the case of *State* v. *Salmon*, (1901) Taft, C. J. held, that a paper taken from one's person in violation of his constitutional right of freedom from unlawful search and seizure is not admissible in evidence against him, and that the seizure of a person's private papers, to be used in evidence against him is equivalent to compelling him to be a witness against himself.[6] In 1905 this same question came up in the case of *State v. Krinski* on a prosecution for keeping for sale intoxicating liquors without a license, the court held that it was proper to admit in evidence liquors which had been seized, irre-

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[4] *Bacon* v. *U. S.*, 97 Fed. 35; *Scott* v. *State*, 113 Ala. 64; *Stracham* v. *State*, 62 Ark. 538; *State* v. *Griswold*, 67 Conn. 290; *Williams* v. *State*, 100 Ga. 511; *Trask* v. *People*, 151 Ill. 523, *Commonwealth* v. *Certain Lottery Tickets*, 5 Cush (Mass.), 369; *State* v. *Pomeroy*, 130 Mo. 489; *State* v. *Glynn*, 34 N. H. 64; *State* v. *Atkinson*, 40 S. C. 363; *State* v. *Edwards*, 51 W. Va. 220, and *Russell* v. *State*, 92 N. W. (Neb.) 751.

[5] *Boyd* v. *United States*. 116 U. S. 616, also see *Weeks* v. *United States*, 21 Ct. Cl. (U. S.) 124; *Gouled* v. *United States*, 255 U. S. 261 (1921), held, "That the admission in evidence against a defendant of a paper secretly seized from his possession by a representative of the United States government, in violation of constitutional amendment four, is contrary to constitutional amendment five, providing that no person shall in any criminal case he compelled to be a witness against himself. *Amous* v. *United States*, 255 U. S. 313; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, and *Holmes* v. *United States*, 275 Fed. 49.

[6] *State* v. *Slamon*, 73 Vt. 212.

spective of the legality of the warrant.[7] In Georgia the case of *Underwood* v. *State,* (1913) where the officer arrested the prisoner without a warrant, took his keys to his safe from his pocket and upon examination discovered intoxicating liquors in the safe which were later introduced as evidence. The court held, that such evidence was improperly admitted; its admission being in violation of the Constitution Art. 1, Sec. 1, par. 6, providing that no person shall be compelled to give testimony tending to incriminate himself.[8] In 1915 this question was again presented to the Georgia court in the case of *McAlister* v. *State* where the officer represented that he had an order from the judge of the superior court; required the defendant to deliver to him a safe which upon being broken open was found to contain whiskey which was later introduced as evidence against the defendant. The court held, that the evidence though obtained by unlawful search and seizure, was not inadmissible under the limitations fixed by art. 1, sec. 1, par. 6, of the Constitution of Georgia.[9] From this it may be deducted that some jurisdictions while holding that evidence received by a irregular search and seizure is not admissible, yet in some instances where certain questions or circumstances present themselves the evidence is admitted regardless of its legal or illegal obtainment.

In *People* v. *Marxhouser,* (1919) an officer entered the defendants home in his absence and by the command of no court, for the purpose of searching and seizing intoxicating liquors. The court held, that this was an unauthorized trespass, and an invasion of the constitutional rights of the person occupying the premises, guaranteed by the Michigan Constitution art. 2, secs. 10, 16 and compelling of a defendant to be a witness against himself.[10]

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[7] *State* v. *Krinski,* 78 Vt. 162.

[8] *Underwood* v. *State,* 13 Ga. App. 206.

[9] *McAlvester* v. *State,* 17 Ga. App. 159. The Georgia rule regarding the admissibility of evidence received by unlawful search and seizure seems to be well established that such evidence is admissible. See *Smith* v. *State,* 17 Ga. App. 693; *Calhoun* v. *State,* 144 Ga. 679; *Hornbuck* v. *Town of Dectur,* 88 S. E. 748, and *Borwn* v. *State,* 89 S. E. 342.

[10] *People* v. *Marxhouser,* 171 N. W. (Mich.) 557; *Town of Blacksburg* v. *Beam* (1916), 88 S. E. 441; *McGarry* v. *State* (1918), 200 S. W. (Tex.) 527; *U. S.* v. *Hill* (U. S. D. C. Ohio), 263 Fed. 812; *People* v. *Mayhew* (1921), 182 N. W. (Mich.) 676.

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In *Youman* v. *Commonwealth,* Carroll, C. J., decided that, evidence received by unlawful search and seizure is not admissible. In this decision he said: "Will a high court of the state say in effect to one of its officers that the Constitution of the state prohibit a search of the premises of the person without a search warrant, but if you can obtain evidence against the accused by so doing you may go to his premises, break open the doors of his house, and search it in his absence, or over his protest, if present, and this court will permit the evidence so secured to go to the jury to secure his conviction? It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that courts had no respect for the Constitution or laws, when respect interfered with the desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital fundamental principle of the law in order to secure its convictions. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than a great constitutional mandate should be nullified. It is trifling with the importance of the question to say, as some courts have said, that the injured party has his cause of action against the officer, and this should be sufficient satisfaction. Perhaps so far as the rights of the individual are concerned, this might answer; but it does not meet the demands of the law-abiding public, who are more interested in the preservation of fundamental principles than they are in the punishment of some petty offender."[11]

According to the Kentucky rule if an officer searches a person's premises without a warrant, but with his permission, evidence obtained by this search is admissible against him.[12] Articles taken from the prisoner after his arrest are admissible as evidence.[13] In *Commonwealth* v. *Riley* the court held, that

[11] *Youman* v. *Commonwealth* (1920), 224 S. W. 860.
[12] *Banks* v. *Commonwealth* (1921), 227 S. W. 455.
[13] *Turner* v. *Commonwealth* (1921), 231 S. W. 519.

where the act of the sheriff in arresting defendant without a warrant, on belief that he had committed a felony either by breaking into a bonded whiskey warehouse or by having tools or appliances therefor, was warranted and tools found in the defendant's possession are admissible; there being no unlawful search and seizure.[14] If the warrant is improperly issued and the owner consents to the search evidence received by this search is admissible, the owner's consent being held to be sufficient authorization.[15] The admission of evidence received by a search of the defendant's suit case was held to be improper.[16] Where a moonshine still was being operated in the open the search and seizure of the still without a warrant was not unreasonable and that evidence obtained by this search was admissible.[17] The established Kentucky rule is that evidence received by a unlawful search and seizure is not admissible; that is, once it has been determined that the search and seizure was unlawful, the evidence obtained is not admissible against the accused. As shown above this is in conformity with the rule established by the United States Supreme Court.

Mr. Zechariah Chafee, Jr., in an article published in the April number of the Harvard Law Review (1922) entitled "The Progress of the Law, 1919-1922" after a review of the subject of evidence said, "The effect of the Supreme Court decisions upon state courts is beginning to be felt. Although the majority of these limit redress to a civil action,[18] Michigan,[19] and Kentucky[20] have lately held the evidence inadmissible. In fact the Kentucky decision has gone beyond the Federal doctrine in two respects. The United States courts usually require a petition for the return of the evidence to be made within a reasonable

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[14] *Commonwealth* v. *Riley* (1921), 232 S. W. 630.
[15] *Bruner* v. *Commonwealth* (1921), 233 S. W. 795.
[16] *Ash* v. *Commonwealth* (1922), 236 S. W. 1032.
[17] *Bowling* v. *Commonwealth* (1922), 237 S. W. 381.
The following cases were cited by the Harvard Law Review.
[18] *Rippey* v. *State*, 86 Tex. Crim. 539, 219 S. W. 463 (1920); *Benson* v. *State*, 233 S. W. 758 (Ark., 1921); *Johnson* v. *State*, 151 Ga. 21 (1921). See "Right to recover property held by public authorities as evidence for use in a criminal trial," 11 A. L. R. 681, annotating *Azparren* v. *Ferrel*, 191 Pac. 571 (1920), which refused replevin.
[19] *People* v. *Le Vasseur*, 213 Mich. 177 (1921); *People* v. *Marxhausen*, 204 Mich. 167 (1921); *People* v. *De La Mater*, 213 Mich. 167 (1921). Accord, *People* v. *Mayen*, 35 Cal. App. Dec. 442 (1921).
[20] *Youman* v. *Commonwealth*, 189 Ky. 152 (1920).

time after the discovery of the illegal seizure.[21] The Kentucky court says:[22] "In our practice the proper time, and the only time, in which objection can be made to the introduction of evidence by the mouth of witnesses is when it is offered during the trial, and we cannot think of any good reason why this practice should not obtain in a case like the one we are now considering." Also, the Kentucky court reversed the order of the trial judge, that whiskey be confiscated and poured by the sheriff of the county into a sewer, and ordered it returned to the owner; while at least one United States District Judge[23] has held that while the illegal seizure requires a conviction to be set aside—"The eighteenth Amendment to the Federal Constitution is as sacred as the Fourth and Fifth Amendments, but no more so"[24]—the illicit mash, liquors, stills, and parts of stills would not be returned because they were contraband and might be again used in violation of the law."

It is to be noted that this apparant difference does not concern the fundamental constitutional principle involved, but only concerns the procedural law. Evidence received by unlawful search and seizure is not admitted under the Supreme Court rule, barring the difference in procedure the same rule is being enforced by the Kentucky courts. In *Youman* v. *Commonwealth,* Carroll, C. J., after citing the constitutional clauses on this subject in both the United States and the Kentucky Constitutions said, "It will be observed that there is no substantial difference between the wording of the clauses in the Federal and state Constitutions, and it is therefore very proper that we should refer to some of the opinions of the Supreme Court of the United States, for the purpose of illustrating the high regard in which these provisions are held by that great tribunal." Following this quotation is a resume of the decision of *Boyd* v. *United States, Weeks* v. *United States, Bram* v. *United States*

[21] *Weeks* v. *U. S., supra; Amos* v. *U. S., supra; Holmes* v. *U. S., supra; Gouled* v. *U. S., supra.*

[22] *Youman* v. *Commonwealth, supra; Bruner* v. *Commonwealth, supra.*

[23] *United States* v. *Ryowski,* 267 Fed. 866 (S. D. Ohio, 1920), Sater, J., noted in 21 Col. L. Rev. 291; 15 Ill. L. Rev. 532. This seems to be the practice in the District of Massachusetts. (No Kentucky case cited.)

and Cooley's Constitutional Limitations.[24] When a court speaks in such unmistakeable language as found in this decision we could well say that the decision is in accord with the United States Supreme Court.

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[24] *Youman* v. *Commonwealth, supra; Boyd* v. *United States, supra; Weeks* v. *United States, supra; Bran* v. *United States,* 168 U. S. 532, and Cooly's Constitutional Limitations, p. 367.