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Search and Seizures: 1960

John L. Plattner

James Dillard

The questioned provisions regarding insurance must be tested and scrutinized by able administration, as should determination of rates. For only by experience and more complete statistics can it be determined what is fair for both borrowers and lenders of this region.[83] Indeed, this is the heart of effective regulation of consumer finance: able administration[84] coupled with the development of an enlightened industry which disciplines and advances itself into a financial institution rather than an economic blight.[85]

While North Dakota can look with a good measure of pride on its new legislation, it should be noted that those who are considered "thinkers" in the field advocate the formulation of a consumer credit code[86] abolishing the gaps and inconsistencies of separate and not always coordinated pieces of legislative enactment. If this then be the direction of the future it must be seriously considered by forward looking lawmakers.

J. PHILLIP JOHNSON.

SEARCH AND SEIZURES: 1960

The right of freedom from unreasonable search and seizure has always been one of the cornerstones of the American constitutional system. In 1960 the Supreme Court of the United States handed down three decisions that profoundly affected this fundamental principle of law. On the one hand the Court substantially strengthened the protection of the Fourth Amendment so far as state officers are concerned by repudiating the so-called "silver platter" doctrine,[1] under which evidence obtained by these officers in an illegal fashion was nonetheless admissible in the federal courts. Conversely the decisions upholding the right of compulsory inspection by state

83. See Miller, *The Economics of Fair Charges*, 16 Mo. L. Rev. 274 (1951). The small loan laws are virtually alone in requiring that all charges be denominated interest. Other lending agencies charge the ordinary contract rate of interest and charge separately for services.

84. See Sullivan, *Administration of a Regulatory Small Loan Law*, 8 Law & Contemp. Prob. 146 (1941). While the North Dakota act went into effect in July 1960 it was not until August that funds were available for administration, leaving issuance of licenses until October. Letter from Alf Hager, Deputy Examiner, Small Loans Division, Oct. 31, 190.

85. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 Law & Contemp. Prob. 108, 126 (1941) "Morality has been achieved in this business not by the mere passage of a law but by fostering a remedial business which, from enlightened self interest polices its own area with everlasting vigilance and vigor."; Redfield, *The Responsibility of all Consumer Lending Agencies to Help Eliminate the Loan Shark Evil*, 19 Law & Contemp. Prob. 104 (1954).

86. Henderson, *The Future of the Loan Shark and Consumer Credit Agencies*, 19 Law & Contemp. Prob. 127 (1954); Hubachek, *The Drift Toward a Consumer Credit Code*, 16 U. Chi. L. R. 609 (1949).

1. Lustig v. United States, 338 U.S. 74, 78 (1948). Stated "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter" (Felix Frankfurter for the majority).

health and safety officers appear to have weakened the coverage of the Fourth Amendment in important respects as evidenced in *Ohio ex. rel Eaton* v. *Price.*[2]

Admissibility of evidence obtained in an illegal search and seizure is a problem that has plagued the Supreme Court for 75 years. The Court's progression seems to have finally been resolved in the decisions of *Elkins v. United States*[3] and *Rios v. United States.*[4] These are parallel cases in theory, though factually distinguishable and represent a summation of the Supreme Court's view on admissibility today.

In the *Rios* case[5] the defendant was observed in a cab by two Los Angeles police officers who followed him in an unmarked car. They had no reason to suspect him of anything illegal except that the neighborhood had a reputation for narcotics activity. They stopped the defendant on a ruse of a routine inquiry. There was conflicting testimony as to the events that followed but nevertheless the defendant dropped a package of heroin on the floor of the cab as he attempted to get out and it was seized by the policemen who then apprehended Rios. The Superior Court of Los Angeles quashed the indictment on the grounds that the search was unconstitutional and therefore illegal.[6] The facts were then disclosed to the federal authorities who indicted Rios. On a proper motion by the defendant to suppress evidence the Federal District Court expressed the opinion, based on the transcript of the state court procedings and additional testimony of the two police officers at their hearing, that the officers had obtained the evidence lawfully and as a result the seizure was permissive. The Supreme Court, Mr. Justice Stewart,[7] held that the validity of the search which resulted in the seizure of narcotics must be determined upon the narrow question of when the arrest occurred and the answer depends on an evaluation of all the facts which had not been made when the trial court expressed its opinion. The unresolved question then was: "independently of the state court's determination was the evidence used against the petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?"

In *Elkins v. United States,*[8] the defendant's were convicted of in-

2. 80 S.Ct. 1463 (1960).
3. 80 S.Ct. 1437 (1960).
4. 80 S.Ct. 1431 (1960).
5. The case of Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958). Prempted the Rios Case with the same holding on the Cricuit Court level.
6. Based on Cal. Pen. Code Ann. § 836 (West 1954).
7. Justices, Frankfurter, Clark, Harlan, and Whittaker dissented.
8. 266 F.2d 588 (9th Cir. 1958) at appelate level.

tercepting and recording wire communications and divulging such communications of conspiracy to violate the Communcations Act.[9] The sole issue there was: "If the evidence was unlawfully obtained was such evidence admissible in the federal prosecution of the defendant because it was obtained by state officers without federal participation." The Supreme Court, Mr. Justice Stewart, held that where evidence is 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, the evidence procured thereby is inadmissible in Federal Court.[10]

I. HISTORY OF ADMISSIBILITY

At common law the method used in obtaining evidence did not affect its admissibility.[11] The first major decision was that of *Boyd v. Unted States*[12] which held that compulsory extortion of a man's personal papers to be used in evidence against him for conviction is in essence a violation of the Fourth Amendment.[13] This broad pronouncement gave the Fourth Amendment substantially the same meaning with regard to the use of evidence illegally obtained.[14] The resulting principle is that the Fourth Amendment is violated where the defendant is searched illegally and the evidence is later used against him.

Nineteen years later the Court seemingly contradicted the Boyd case in *Adams v. New York*[15] when the Court said that as long as the evidence seized is pertinent to an issue in the case, it does not matter from what source the evidence had been derived. The Court thus took a 180 degree turn from its previous decision and returned to the common law principles.

In 1914 the principles that were laid down in the Boyd case were crystalized by *Weeks v. United States*[16] which established the exclusionary rule which keeps out of federal court, evidence obtained

9. 18 U.S.C.A.; Communications Act of 1934.
10. Justices, Frankfurter, Clark, Harlan, and Whittaker again dissented vigorously.
11. 8 Wigmore, Evidence § 2183 (3rd ed. 1940).
12. 116 U.S. 616 (1886).
13. U.S.C.A. Amend. 4.
14. In so far as it was held that the product of an illegal search was inadmissible, it was impliedly discredited by the opinion in Adams v. New York, 192 U.S. 585 (1904), which though distinguishable as a review of state action gave wholesale approval to the traditional doctrines of the admissibility of illegally obtained evidence.
15. 192 U.S. 585 (1904).
16. 232 U.S. 383 (1914). To the exclusionary rule of the Weeks case there has been unquestioning adherence for almost a half a century. See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1919); Gouled v. United States, 255 U.S. 298 (1920); Amos v. United States, 255 U.S. 313 (1920); Agnello v. United States, 269 U.S. 20 (1925); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1930); Grau v. United States, 287 U.S. 124 (1932); McDonald v. United States, 335 U.S. 451 (1948); United States v. Jeffers, 342 U.S. 48 (1952).

by Federal agents in violation of the defendant's rights under the Fourth Amendment. However, evidence obtained from an illegal search, is nevertheless admissible in a federal court, where the search was made for the purpose of enforcing state law and done by state officers. An anomalous situation was then created where in one instance evidence obtained as a result of an illegal search and seizure by federal officers was inadmissible but the same evidence could be secured by state officers and its admissibility was beyond question.[17] This dichotomy was affirmed and qualified by *Byars v. United States*[18] to the effect that there could be no collusion between state and federal officers in the search and seizure. In the same year this holding was extended by *Gambino v. United States*[19] which held that evidence obtained solely by a state officer, but for the exclusive use of a federal officer was also inadmissible. The distinguishing feature being that the *Weeks* holding was on the basis that the search was for the purpose of enforcing state and not federal law.

The effect of the Fourth Amendment then is to put the courts of the United States and their officials, in the exercise of their power under certain limitations as to the exercise of such, and to secure the people and their property against all unreasonable searches and seizures under the guise of the law.

The distinction between the constitutional rights under the Fourth and Fourteenth Amendments was further contrasted in *Wolf v. Colorado*.[20] The majority approved prior decisions[21] holding that the due process clause of the Fourteenth Amendment does not incorporate all the provisions of the first eight amendments but only those "implicit in the concept of ordered liberty".[22]

17. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1919), Holmes J., in language often quoted said, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

18. 273 U.S. 28 (1927); aff'd in Feldman v. United States, 322 U.S. 487 (1944).

19. 275 U.S. 310 (1927).

20. 333 U.S. 879 (1948).

21. Hurtado v. California, 110 U.S. 516 (1883); Twining v. New Jersey, 211 U.S. 78 (1908); Palko v. Connecticuit, 302 U.S. 319 (1937).

22. It cannot be doubted, that the majority speaking through Justice Frankfurter, took cognizance of People v. Defore, 242 N.Y. 13, 150 N.E. 585, 587 (1926). There Cardozo Jr. said "No doubt there would be greater protection for the individaul if evidence illegally obtained by state officers in state court were not admissible. But can we say the criminal is to go free because the constable has blundered? The question is whether this protection would not be gained at a disproportionate loss of protection for society. On the one hand there is the social need that crime should be repressed. On the other, the social need that law should not be flouted by the insolence of the office. There are dangers in either choice. The rule [of admissibility] strikes a balance between these opposing in terests. We must hold it to be the law until those organs of government by which a

The application of the Fourteenth Amendment was further construed in *Rochin v. California*.[23] and *Irvine v. California*.[24] In the Rochin case police officers forced the extraction of morphine capsules from the defendant's stomach.[25] The Supreme Court reversed the conviction of the state court because these methods of procurement were in violation of the Fourteenth Amendment. The distinguishing feature between the Rochin and Wolf decisions was the interpretation by the court that the methods used were "offensive to a sense of justice". Therefore the outlying principle set up is that though a search and seizure may be admissible if illegal it cannot be so if the methods used are of a physically coercive and abhorrent nature. The Irvine case falls within the twilight zone between the Wolf and Rochin decisions. There officers set up microphones in the defendant's home unknown to him and the testimony of the conversations taped by the officers was allowed. While the majority opinion recognized that under the Wolf case the security of privacy from arbitrary intrustion by the police is within the concept of "due process" of the Fourteenth Amendment, nevertheless it took into account also that under the Wolf case the Fourteenth Amendment does not forbid evidence obtained by an illegal search and seizure from being admissible in state courts.

An attempt to bring the case within the doctrine of the Rochin decision was rejected by the court on the ground that here the essential features of coercion were lacking. This coercion feature likewise accounted for the difference in the Rochin and Wolf decisions: "However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping." Moreover the Court rejected the suggestion that the Wolf case was more susceptible of differentiation as the invasion of privacy was more shocking and more offensive than the one involved there. "Limiting the application of the Rochin case to instances of 'mild' shock would leave the rule therein laid down too indefinite of application."

In *Benati v. United States*[26] the issue was whether evidence ob-

change of public policy is normally affected shall give notice to the courts that the change has come to pass." North Dakota has held similarly in State v. Pauley, 49 N.D. 488, 192 N.W. 91 (1923) (making liquor illegally; utensils were found in the search of a house without a warrant); State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925); aff'd in State v. Lacey, 55 N.D. 83, 212 N.W. 442 (1927). In State v. Nagel, 28 N.W.2d 665. 667 (N.D. 1947) the court impliedly affirmed, State v. Pauley, *supra* and State v. Fahn, *supra*.

23. 342 U.S. 165 (1952).

24. 347 U.S. 128 (1954).

25. At 165 Justice Frankfurter stated, "They are methods too close to the rack and the screw to permit of constitutional differentation."

26. 355 U.S. 96, 102 (1957).

tained by state officers through wire tapping, which is a Federal crime,[27] is admissible in Federal court. The court held the evidence inadmissible but the decision has given rise to argument as to the converse situation. This then seems to say that if evidence of wire tapping obtained illegally by state officers is inadmissible in Federal court, it would be just as reasonable to say evidence of illegal search and seizure by state officers will be admissible.

A forerunner of the *Rios and Elkins* decisions was *Rea* v. *United States*[28] where it was held that evidence illegally obtained by a federal officer could not be used as evidence in a state court. The majority opinion relied on an injunction directed to the officer compelling him not to testify . The injunction seems to rest on the Court's general supervisory powers over federal law enforcement agencies.[29]

It was with this background that the Supreme Court of the United States finally resolved the issues presented by history in the joint decisions of *Rios v. United States* and *Elkins v. United States.*

"Courts proceed step by step," Justice Holmes once said.[30] The history of illegally obtained evidence has had an innocous beginning starting with the proposition that the method of securing evidence was not a factor in determining the merits of its admissibility. *Rios* and *Elkins* have finally resolved the uncertainties of the past by ruling that evidence obtained illegally by state officers is inadmissible in federal court. It is now up to the Federal Courts to rule in the first instance whether the evidence was procured in contravention of a person's constitutional rights. Whether this holding will stand the test of time, no one knows. Since it appears that our constitutional liberties are being further extended, it would be a step backwards to stray from the path of our present holdings.[31]

II. ADMISSIBILITY OF EVIDENCE IN RELATION TO INSPECTION STATUTES

It is strange that the Supreme Court should constrict the application of the Fourth Amendment in relation to personal rights of privacy so shortly after its liberalization in the prior decisions of

27. 47 U.S.C. § 605 (1952).
28. 350 U.S. 214 (1956).
29. "In this posture we have seen then that a case raises not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies." Citing McNabb v. United States, 318 U.S. 322 (1943).
30. Johnson v. United States, 228 U.S. 457, 458 (1913).
31. In United States v. Pugliese, 153 F.2d 497, 499 (2d Cir. 1945) the reason for the rule of excluding illegally obtained evidence was aptly put by Hand L. Circuit Judge when he said, "The reason for the exclusion of evidence competent as such, which has been unlawfully acquired, is that exclusion is the only practical way of enforcing the constitutional privilege. In earlier times an action of trespass against the offending official may have been enough protection but that is no longer true. Only in case the prosecution which itself controls the seizing officials, knows that it cannot profit by their wrong, will that wrong be suppressed."

Rios and *Elkins*. Due to the complexities of urbanization, inspection statutes are becoming more prevalent. The contention is made, that entries which are authorized without a search warrent are in violation of the Fourth Amendment. Generally this has been refuted, but not with the detrimental effect of the recent decision, *Ohio ex. rel Eaton v. Price*.[32] The facts were that Dayton, Ohio, had a city ordinance authorizing health and safety inspections of private residences by inspectors who were required to show proper identification and conduct inspections at a reasonable hour. Defendant refused to permit safety inspectors to enter his home and make an inspection on the ground they had no search warrent and were thus engaged in an illegal search under the Fourth Amendment to the United States Constitution. He was convicted and fined for breach of the ordinance. The Supreme Court of the United States held, four Justices dissenting, that the statute was constitutional.

The case is a corollary adjudication to *Frank v. Maryland*,[33] which upheld the constitutionality of a basically similar Maryland statute authorizing inspection of private premises by public health officers engaged in enforcing health laws. The essential difference between the two cases are primarily factual. In the *Frank* case, the health inspectors appeared to have probable cause for desiring to make a search; they were looking for a nest of disease-bearing rodents in the neighborhood, and the dilapidated condition of the dwelling house plus evidence of the presence of rodents was visable to the eye.[34] In the instant case, no such probable cause was proven and the demand for inspection of the premises was made on a "spot check" or "area check" basis.[35]

Thus from *Frank* to *Eaton* a substantial expansion of the permissible grounds of inspection is already visible.[36]

In other states there might be some question as to whether the violation of such a local ordinance would result in civil or criminal liability.[37] North Dakota adjudications indicate that proceedings of

32. 80 S. Ct. 1463 (1960).
33. 359 U.S. 360 (1959).
34. The applicable part of the *Frank* statute reads, "That there shall be probable cause as shown by valid grounds that suspicion of a nuisance exists before entry shall be made."
35. The applicable part of the *Ohio* statute reads, "For the purpose of making inspections [the inspector must show] appropriate identification, and survey at a reasonable hour."
36. In Jaybird Mining Co. v. Weir, 271 U.S. 609, 631 (1925), Brandies, J., dissenting, "It is a peculiar virtue of our system of law that the progress of inclusion and exclusion, so often used in the developing of a certain rule is not allowed to end with its enunciation and that expression in an opinion yields later to the impact of facts unforseen."
37. State *ex, rel* Keefe v. Schmiege, 251 Wis. 70, 28 N.W.2d 345 (1947); Keefe v. Colorado, 37 Colo. 317, 87 Pac. 791 (1906) (holding it must be civil); Komen v. St. Louis 316 Mo. 9, 289 S.W. (1925); Straus v. State, Tex Crim 132, 173 S.W. 663 (1915) (holding that it is criminal).

the type found in the principal case would probably be deemed to involve criminal liability,[38] and that the constitutional protections surrounding defendants in criminal actions would thus be applicable. However, the constitutional problem is much the same in either instance, since the protection of the Fourth Amendment is not limited to criminal prosecutions. The Fourth Amendment was designed to protect the individual from unnecessary invisions of his right of privacy in his own home. Thus it was said by Judge Prettyman in *District of Columbia v. Little*,[39] that "The basic premise of the prohibition against searches and seizures was not the protection against self incrimination; it was the right of every man to privacy in his own home." Judge Prettyman added that the protection of the Fourth Amendment extended alike against health inspectors and police officers.

In support of the validity of such statutes the argument is sometimes made that there is a distinction between a search of premises, as regulated by the Fourth Amendment, and a mere investigation as permitted by the statutes. The theory is that a search involves looking for something which is capable of seizure, while an investigation is merely a looking around, as in checking over premises.[40] But it would seem that the latter and broader type of inquiry is even more dangerous to privacy and security.[41] Moreover, it is possible —as the dissenting opinion in the *Price* case pointed out—that validation of an unrestricted right of inspection by local officials will permit harrassment of citizens who are unpopular with the local administration, through inspections repeatedly conducted out of spite or similar unworthy motives.

It is true, of course, that constitutional rights are relative rather than absolute,[42] and the process of constitutional adjudication is marked by a weighing of conflicting social values: *e. g.*, the benefits from enforcement of an individual right of privacy must be weighed against the benefits to be derived from enforcement of health regulations. Moreover, the protection of the Fourth Amendment is not against all searches but only such as are unreasonable.[43] Thus a search warrant is not needed, for instance, to authorize a search as

38. Strong dicta in Boyd v. United States, 116 U.S. 616, 625 (1886).
39. 178 F.2d 13, 14 (D.C. Cir. 1949).
40. State v. Armeno, 29 R.I. 431, 72 Atl. 216 (1909).
41. See Sullivan v. Brawner, 237 Ky. 730, 36 S.W.2d 364 (1934).
42. Schneck v. United States, 249 U.S. 47 (1918); This is Justice Holmes famous decision that you cannot yell fire in a crowded theater. Aff'd by: Debs v. United States, 249 U.S. 211 (1918) and Chaplinsky v. New Hampshire, 315 U.S. 568 (1941).
43. Elkins v. United States, 80 S.Ct. 1431 (1960).

an incident of a valid arrest.[44] And it is also true that municipal ordinances pertaining to such matters as plumbing and sewage disposal,[45] housing inspection,[46] and food inspection[47] cannot be effectively administered without inspection. Thus the *Price* case would seem open to criticism not on the ground it validates such inspections, but because of the lack of substantive[48] as well as procedural[49] protection given to the private citizen by the ordinances in question. No advance notice is given before the inspection; no showing of probable cause was made in the *Price* case;[50] and the only safeguards are that the inspectors must show proper credentals and make the inspection at a reasonable hour. In such a situation an obvious danger arises that police officers who would not be entitled to a search warrant because of lack of evidence will, in effect, be enabled to carry out general searches indirectly through collusion with health inspectors. Indeed, in many instances peace officers are themselves designated as inspecting officers; and it may be anticipated that serious questions may arise involving the duality of the officer's status, *i. e.*, is he inspecting as a health officer or as a peace officer?[51]

III. CONCLUSION

North Dakota has no cases on this particular point. A few statutes nevertheless provide for inspections by peace officers and others in the enforcement of statutes relating to child labor and wages and hours.[52] Suppose such an inspection turned up evidence of a different offense? In the light of *Elkins v. United States,* which holds in-

44. Unted States v. Rabinokitz, 339 U.S. 56 (1950). This rule is consistent with the well established proposition that constitutional safeguards are not absolute and must sometime yield to a greater public interest.

45. Commonwealth v. Dourghty, 156 Pa. Super. 520, 40 A.2d 902 (1945).

46. Savage v. District of Columbia, 54 A.2d 562 (D.C. 1948).

47. Keiper v. Louicville, 152 Ky. 691, 154 S.W. 18 (1913).

48. Wolf v. Colorado, 338 U.S. 25 (1948).

49. Johnson v. United States, 228 U.S. 457 (1913).

50. Ohio *ex. rel.* Eaton v. Price, 80 S.Ct. 1463, 1467 (1960). This is the major point of contrast with the *Frank* case.

51. The use of health inspections as a means for obtaining evidence to a crime may be encouraged by the *Frank* and *Eaton* decisions. The Baltimore police did not wait long to try that device. In State v. Pettiford, Baltimore Superior Bench, 28 U.S.L. Week 2286 (Dec. 1959) a police officer assigned to the sanitation division, had utilized the power of entry granted by the city health ordinance (City Code art. 12, § 120) to gain entry to a house, observe an illegal lottery, and then to signal a waiting vice-squad officer. The court ruled that *Wolf v. Colorado* required that the evidence be excluded, for the exception to *Wolf* created by *Frank* is not used to cover searches without warrants inconsistant with the conceptions of human rights embodied in our State and Federal Constitutions.

Thus convictions obtained as a result of these novel "searches" for criminal evidence may not stand in the face of collaboration between police and health officers, at least where conviction is by a federal court. This in no way affects state or city convictions and where the exclusionary rule is in effect obtaining proof of collaboration would be very difficult, for it is likely that most police techniques utilizing this new approach will be more sophisticated than the feeble attempt made by the Baltimore police.

52. N.D. Cent. Code §§ 34-07-01; 34-0702.

admissible in *federal* prosecutions evidence illegally obtained by *state* officials, a complex issue of legality of the inspection might be presented to the federal courts. At present however, it seems reasonably clear no such argument would succeed in keeping the evidence out of a state prosecution following the non-exclusionary rule. While a state may not pursue an affirmative policy of violating the Fourth Amendment, admission of such evidence in state prosecutions is still permissible.[53]

JOHN L. PLATTNER
JAMES DILLARD.

53. State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925); State v. Pauley, 49 N.D. 488, 192 N.W. 91 (1923).