Michigan Law Review

Volume 59 | Issue 3

1961

Constitutional Law - Search and Seizure - Duty of Home Owner to Permit Housing Inspection Without A Warrant

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CONSTITUTIONAL LAW — SEARCH AND SEIZURE — DUTY OF HOME OWNER TO PERMIT HOUSING INSPECTION WITHOUT A WARRANT — A Dayton, Ohio, city ordinance[1] authorized housing inspectors to inspect any dwelling, without requiring a search warrant, for the purpose of safeguarding the public health and safety. Acting in compliance with the requirements of this ordinance, city housing inspectors requested admittance to appellant's home in order to conduct a health inspection. Appellant refused to permit the inspectors to enter and inspect his home without a search warrant, and was therefore arrested and confined for violating the ordinance. Discharge of appellant in habeas corpus proceedings[2] was reversed by the Ohio Court of Appeals.[3] On appeal to the United States Supreme Court, *held,* affirmed by an equally divided Court, *Ohio ex rel. Eaton v. Price,* 364 U.S. 263 (1960).[4]

In determining the protection afforded by the fourth amendment to the Constitution, the Supreme Court has traditionally recognized the right to search in only two situations: where a search warrant is obtained from a magistrate,[5] and where the search is incident to a lawful arrest.[6] After *Wolf v. Colorado,*[7] in which a unanimous Court stated that the fourteenth amendment prohibited unreasonable searches and seizures by state officers, it was thought that the Court would treat the protection afforded by the due process clause of the fourteenth amendment against unreasonable

[1] DAYTON, OHIO, CODE OF GENERAL ORDINANCES § 806-30 (a) (1954) provides: "The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings . . . located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings. . . . The owner or occupant of every dwelling . . . shall give the Housing Inspector free access to such dwelling. . . ."

[2] In Ohio the constitutionality of an ordinance may be determined in habeas corpus proceedings when the petitioner is under arrest but has not been tried and convicted. Arnold v. Yanders, 56 Ohio St. 417, 47 N.E. 50 (1897). The ordinance was held invalid by the Ohio Court of Common Pleas as a violation of the OHIO CONST. art. 1, § 14 and the U.S. CONST. amend. IV. It is not indicated why the Ohio court considered this a violation of the fourth, rather than the fourteenth, amendment.

[3] State *ex rel.* Eaton v. Price, 105 Ohio App. 376, 152 N.E.2d 776 (1957), *aff'd,* 168 Ohio St. 123, 151 N.E.2d 523 (1958).

[4] Chief Justice Warren, and Justices Brennan, Black and Douglas dissented. Mr. Justice Stewart did not take part in this decision.

[5] Johnson v. United States, 333 U.S. 10 (1948).

[6] See Weeks v. United States, 232 U.S. 383, 392 (1914). Moreover, if the search is incident to an arrest made without an arrest warrant, the Court will require that the grounds for lawful arrest exist *prior* to the search. Henry v. United States, 361 U.S. 98 (1959). *But see* Carroll v. United States, 267 U.S. 132 (1925), 24 MICH. L. REV. 277 (1926), where the Court upheld the right to search an automobile independent of a lawful arrest where there existed reasonable grounds to believe the automobile was being used to commit a *misdemeanor* by transporting contraband. The Court recognized this limited exception because of the impracticability of securing a warrant to search a vehicle which might be removed from the jurisdiction while the police were obtaining a warrant.

[7] 338 U.S. 25 (1949).

searches qualitatively the same as it had treated that protection under the fourth amendment.[8]

In *Frank v. Maryland*,[9] however, the Court departed from these standards to uphold a city ordinance authorizing inspections of private homes by health inspectors, where the ordinance did not require the inspectors to obtain a search warrant. At least four of the Justices[10] in the majority in *Frank* appeared to ignore the approach suggested by *Wolf* and, instead, to apply the traditional due process test of weighing the interest of the individual in his privacy against the interest of the state in maintaining adequate health and safety standards. They considered the following factors to be relevant: the long history of authorized health inspections without warrants;[11] the provisions of the ordinance [12] which required that the health inspectors have reason to suspect that a nuisance exists before the inspection is made,[13] and that the inspection be made at a reasonable hour;[14] the fact that no evidence for a criminal prosecution was being sought;[15] and the fact that the ordinance did not authorize inspections where the occupant was unwilling to allow the inspectors to enter.[16] In the light of these factors the Court considered that the interest of the public in its health and safety outweighed the slight restrictions placed on appellant's privacy by allowing inspections without a warrant.[17] In the principal case four Justices[18] considered the present case to be "controlled" by *Frank*.[19] Thus, although the

8 See, *e.g.*, Frank v. Maryland, 359 U.S. 360, 374 (1959) (dissenting opinion). This interpretation of *Wolf* is also taken by CORWIN, THE CONSTITUTION OF THE UNITED STATES 830 (1953). However, the Court has generally agreed that the fourteenth amendment does not incorporate all of the first eight amendments. Adamson v. California, 332 U.S. 46 (1947). See generally ROTTSCHAEFER, CONSTITUTIONAL LAW 741-42 (1939). See also Handler, *The Fourth Amendment, Federalism, and Mr. Justice Frankfurter*, 8 SYRACUSE L. REV. 166 (1957). Compare District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950), declaring a District of Columbia ordinance similar to the one in the principal case unconstitutional as a violation of the fourth amendment.

9 359 U.S. 360 (1959).

10 Justices Frankfurter, Clark, Harlan and Stewart. Mr. Justice Whittaker concurred.

11 Frank v. Maryland, *supra* note 9, at 367-73.

12 BALTIMORE, MD., CITY CODE art. 12, § 120 (1950).

13 Frank v. Maryland, *supra* note 9, at 366.

14 *Ibid.*

15 *Ibid.*

16 *Id.* at 367.

17 The Court in the *Frank* case also considered the subsidiary problem whether a warrant could legally be obtained if one were required. The Court feared either that it could not be obtained because of the strict constitutional requirements regulating their issuance, or that those requirements would thereby be lowered. Both alternatives were unsatisfactory to the Court—the first because it would greatly impair the efficiency of the inspection program, and the second because it would be constitutionally unacceptable. *Id.* at 373. However, if the search itself did not violate any constitutional rights or lower any constitutional standards, it is difficult to see why the issuance of a warrant to make such a search should do so. See generally Comment, 44 MINN. L. REV. 513, 531-32 nn. 66 & 67, where the author concludes from interviews with various directors of housing inspection that requiring warrants for entry into private homes would pose no serious threat to community health.

18 Justices Clark, Frankfurter, Harlan and Whittaker.

19 Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 248 (1959).

Court in the present case was equally divided, this case plays an important role in delineating the factors which were considered significant in upholding the ordinance in *Frank*. Although the ordinance in the principal case provides substantially heavier penalties for its violation than did the ordinance in *Frank*,[20] the principal distinction appears to be that the ordinance did not require as a condition of inspection that valid grounds exist for suspecting a nuisance.[21] Therefore, if a majority of the Court in the future does in fact hold that circumstances like those in the present case are controlled by the *Frank* decision, this would represent a substantial relaxation of the standards formulated by the *Frank* decision.

If the foregoing interpretation of the effect of the principal case is valid, interesting problems may be raised under an ordinance similar to that in the principal case by the following hypothetical situations: (1) where the ordinance imposes criminal rather than civil penalties;[22] (2) where the search is originally conducted for bona fide health purposes, but the evidence thus obtained is later introduced in any criminal proceedings;[23] and (3) where a health inspection is conducted as a mere facade for obtaining evidence to be used in a criminal prosecution. If the Court is to be consistent, it will apply the traditional due process "balancing of interest" test to all three situations. Under this test it would be difficult to generalize

[20] *Compare* DAYTON, OHIO, CODE OF GENERAL ORDINANCES § 806-83 (1954), which provides for penalties up to a $200 fine and thirty days' confinement, *with* BALTIMORE, MD., CITY CODE art. 12, § 120 (1950), which provides for a fine of only twenty dollars.

[21] The ordinance involved in the principal case is quoted in note 1 *supra*. The ordinance involved in the *Frank* case provided: "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house . . . he may demand entry therein in the day time. . . ." BALTIMORE, MD., CITY CODE art. 12, § 120 (1950). And, compare the facts in *Frank*, where the attempted inspection was made pursuant to a specific complaint of rats in the neighborhood, and the condition of the premises were in "an extreme state of decay," *id.* at 361, with the facts in the principal case, where no evidence was presented pertaining to the reason for the attempted inspection, and the appellant's home was said to be in a "good, clean, safe, and sanitary condition." State *ex rel.* Eaton v. Price, 105 Ohio App. 376, 377, 152 N.E.2d 776 (1957).

[22] The answer to the question what is a "civil" and what is a "criminal" penalty remains uncertain. The majority of the state courts take the view that violation of an ordinance cannot constitute a crime. CLARK & MARSHALL, CRIMES § 1 (5th ed. 1952). However, some courts have held that a violation of a municipal ordinance designed to protect health and safety is a crime. MILLER, CRIMINAL LAW § 12 (1934). If in fact this is an essential factor in the interpretation of the constitutionality of the ordinance, it would seem that the Supreme Court will be forced to disregard the labels attached to a penalty by the states and establish its own criterion.

[23] In Abel v. United States, 362 U.S. 217, 236 (1960), the Court held that under the fourth amendment a government official acting under an administrative arrest warrant has as much justification to search as does a police officer making a lawful arrest. Evidence found is thus admissible in a criminal trial not connected with the original arrest. Since the requirements of due process under the fourteenth amendment are not more stringent than those imposed by the fourth amendment, it would seem that the same logic could be applied to evidence discovered by city health inspectors in the process of their inspections. However, it should be pointed out that the physical area of permissible search under an arrest warrant is probably much more restricted than that allowed for purposes of health inspection. See generally Note, 59 MICH. L. REV. 310 (1960).

as to the outcome of the first two situations.[24] However, in the third situation, the fact that there was no bona fide health inspection should cause the search to be violative of the due process clause since the interest of the public in safeguarding its health would not then be available to offset the interest of the individual in his privacy.[25]

Hereafter, a home owner, when confronted by an official purporting to conduct a health inspection, will be compelled to make one of two choices. He may refuse entry, and thereby subject himself to rather severe penalties if the official is in fact conducting such an inspection. Or he may permit entry, and thereby subject himself to the possibility of criminal prosecution resulting from the discovery by that official of evidence of criminal activity. Neither of these seems to give the home owner a satisfactory alternative.[26]

Joseph J. Schneider

[24] See notes 22 and 23 *supra*.

[25] In Maryland v. Pettiford, Sup. Bench Balt. City, Dec. 16, 1959, the court was presented with just such a situation and held that the rule in the *Frank* case could not be used to to justify such a search. But it should be recognized that difficult problems of proof will be encountered in seeking to establish that the "health inspection" in any particular case is, in fact, a mere facade.

[26] If the official is not actually carrying on a bona fide inspection, and such action is declared unconstitutional as a violation of the due process clause of the fourteenth amendment, the only recourse open to the home owner will be a civil action against the official for trespass, a remedy generally considered unsatisfactory. Only if the discovered evidence is used in a prosecution for a federal crime, or for a state crime in a state which has adopted the "exclusionary rule" (a rule of evidence which excludes from criminal prosecutions evidence obtained in violation of the restraints against unreasonable searches and seizures), will the criminal prosecution based solely on the acquired evidence be dismissed against the home owner.