No. 236 - October Term, 1961

NOTES ON CONVERSATION WITH TCC HTM

Dollree Mapp, etc.,)
)
Appellant)
) On Appeal from the Supreme
v.) Court of Ohio.
)
Ohio.)

[April ___, 1961.]

MR. JUSTICE CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having in [had her possession certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code.[1] At all stages of the proceedings [Appellant included within her defense ~~has been~~ an attack on this section under the due process clause of the Fourteenth Amendment, and the claim that, under the Fourth Amendment, certain books and pictures seized without warrant should not have been admitted into evidence. Ohio has elected not to follow the exclusion rule announced in Weeks v. United States, 232 U.S. 383 (1914), and the admission of the books and pictures was therefore sustained [below on the authority of Wolf v. Colorado, 338 U.S. 25 (1949). On the

due process question it appears that five of the seven judges of the Supreme Court of Ohio ~~declared~~ considered & the section ~~violative of due process~~ constitutionally invalid but were nevertheless required to uphold its constitutionality because the Ohio constitution 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."[2] 170 Ohio St. 427. On appeal here we noted probable jurisdiction. 346 U.S. 868. On the Fourth Amendment question the Court adheres to its rule announced in Wolf v. Colorado, supra, and hence this contention of appellant is denied.[3] However, we have concluded that the conviction of the appellant is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States which results in a reversal of the judgment. In view of this disposition we do not pass upon other issues raised by appellant.

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to

information that

> "a person [was] hiding out in the home who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home."

Miss Mapp and her daughter lived on the top floor of the two family dwelling with basement. The officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They continued their surveillance of the house, advised headquarters and some three hours later additional officers arrived with a police Lieutenant White, who the evidence indicates, had a search warrant. The officers again attempted entrance and when Miss Mapp did not come down immediately to open the door an officer tried to kick it in, failing which he broke the glass and admitted the group. Meanwhile Miss Mapp's attorney arrived but the officers would not permit him to enter. It seems that Miss Mapp was half way down the stairs when the officers broke into the hall. She demanded the search warrant be served. A paper, claimed to be the warrant, was

shown by one of the officers. She grabbed the "warrant," and placed it in her bosom. A struggle ensued in which the officers took the warrant, handcuffed Miss Mapp, and took her up to her bedroom. Both the second floor and a basement were searched. It is undisputed that policy paraphernalia was found in the basement and an obscene drawing was found in her suitcase under the bed in her room. There is, however, a conflict as to where the other other obscene material was found. Appellant claimed that it had belonged to a former tenant and that she had packed it away with the rest of his belongings in a box in the basement. The officers testified that the material had been found in her bedroom.

At trial no search warrant was produced nor one demanded and its existence appears under question. Appellant in a timely motion had sought to suppress the evidence as to the obscene material seized. The state admits that a proper search warrant was not secured setting forth the confiscated evidence on which the charge was based. It appears, as Ohio's

court has observed, if a search warrant was issued it would have authorized search only for "policy paraphernalia" -- not obscene material. In any event, under Wolf, supra, even its invalidity would not affect the use of the obscene material in evidence. The case was tried on the theory that if Miss Mapp "had some degree of possession or control" over the obscene material she would violate § 2905.34. The jury was so instructed and found her guilty. She was sentenced to a term of one to seven years in the penitentiary. The Court of Appeals of Cuyahoga County affirmed the conviction by Journal Entry. As we have said, the Supreme Court of Ohio affirmed, assuming the constitutionality of § 2905.34 because less than six of its members were of the opinion it was invalid. It held in syllabus of its opinion that the section prohibited "any person from knowingly having in his possession or under his control lewd and lascivious books and pictures" and that therefore

"a defendant may be convicted thereunder where the evidence discloses that, in packing up the belongings of a former roomer in such defendant's home, such defendant found lews and lascivious books and pictures and packed them with such former roomer's other belongings for the purpose of storing them for him until he came for them."

FOOTNOTES

1. Section 2905.34 Selling, exhibiting and possessing obscene literature or drugs, for criminal purposes.

No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawings, representation, figure, image, cast, instrument, or articles of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not more than seven years, or both.

2. Ohio Const, Art. IV, §2.

3. Mr. Justice Clark adheres to his position as to Wolf, supra, stated in his concurrence in Irvine v. California, 347 U.S. 128, ____(1953).

The Fourth Amendment declared as a restriction on the Federal Government that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." In 1949 this Court held that it was embodied in the concept of due process found in the 14th :Amendment "and as such enforceable against the States . . . ." Wolf v. Colorado, supra, at 27.[1] However, the Court decided "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." At p. 33. That a conclusion was reached on the setting then existing and elaborated in the opinion, i.e., thirty-one states then admitted unlawfully seized evidence while only seventeen excluded it, leading to the statement by the Court that it could "not brush aside the experiences of States

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[1]/.

which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the relevant r ules of evidence." At p. 31-32. The Court also felt that any abuses of the rule might be more effectively delt with by "the internal discipline of the police, under the eyes of an alert public opinion." At p. 31. Four years later we were urged to reconsider the doctrine of Wolf and to overrule it. Irvine v. California, 347 U.S. 128 (19). This the Court refused to do, stating:

> "Never until June 1949 did this Court hold the basic search and seizure prohibition in any way applicable to the states under the Fourteenth Amendment. At that time, as we pointed out, thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it. Now that the Wolf doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power." At p. 134.

And now seven years after Irvine and a dozen after Wolf we are again urged to canvass the facts, historical and contemporary, which the Court concluded on balance required the imposition of the doctrine in 1949. In so doing we start, as we must, with the fact that this

Court has declared the Fourth Amendment "enforceable" against the states: At the time of Irvine the Court thought the states had not had "adequate opportunity" to consider the exclusionary doctrine and, therefore, awaited another appropriate case at a later date to consider the problem. We believe that in the light of the historical facts of the Amendment, the gloss placed upon it by this Court's decisions for the past 75 years and the events occurring since Wolf that we believe