4-25-61

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No. 236 - October Term, 1960

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 had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code.[1] As officially stated in the syllabus to its opinion the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home . . . ." 170 Ohio St. 427, 166 N.E. 2d 387. The State says that even though under our cases the search violated the Fourth Amendment, it is not prevented from using the unconstitutionally seized evidence at trial, citing Wolf v. Colorado, 338 U.S. 25 (1949). This Court did indeed hold "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." On this appeal, /at p. 33. wherein we have noted probable jurisdiction, 346 U.S. 868, IT IS URGED ONCE AGAIN THAT WE ~~we therefore have once again presented for our consideration the recurring question of whether it is now timely to~~ review that holding.* 2/

Not long after the Wolf decision, in Irvine v. California, 347 U.S. 128 (1954), this Court indicated that the States had not yet had "adequate opportunity to adopt or reject the doctrine" of Weeks v. United States, 232 U.S. 383 (1914), since "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 p. 134. Only last Term in Elkins v. United States, 364 U.S. 206, the Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" (at p. 212) until the announcement

2/ * OTHER ~~QUESTIONS~~ ISSUES Are presented but in view of our disposition of this question we do not consider them.

for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." At p. ___. The present case once again presents for our consideration the recurring question of whether it is now timely to review that holding.

I.

Seventy-five years ago, in Boyd v. United States, 116 U.S. 616, 630 (1886), considering the Fourth and Fifth Amendments as almost "running into each other" on the facts before it, this Court held that the doctrines of the Fourth Amendment

> "apply to all invasions, on the part of the government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of the doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . ."

The Court noted that "[C]onstitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon." at p. 635. and specifically excluded the use of the papers as "unconstitutional."

Less than thirty years later, in Weeks v. United States, ~~supra~~, 232 U.S. 383 (1914), the Court stated that

> "[T]he Fourth Amendment . . . put the courts of the United States and Federal officials in the exercise of

In this The Court was following Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Congress 439 (1789).

their power and authority, under limitations and restraints . . . and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." At p. 383.

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded:

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." At pp. 391-393.

Finally, the Court in that case clearly stated that use of the seized evidence "~~constituted~~ involved a denial of the constitutional rights of the accused." At p. 398. Thus, in the year 1914, in the Weeks case,

this Court "for the first time" held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." Wolf v. Colorado, supra, at p. 28. This Court has ever since required of federal law ~~enforcers~~ officers a strict adherence to that ~~implementation of the Fourth Amendment.~~ command which this Court has held to be a

~~More than a mere rule of evidence, the mandate of the Weeks case~~ In fact ~~was a~~ clear, specific, and constitutionally required -- even if judicially implied -- deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." Holmes, J., Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts. . . ." Weeks v. United States, supra, at and that such evidence "shall not be used at all." Silverthorne Lumber Co. v. United States, supra, at 392.

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II

Thirty four years after Weeks was announced this Court in Wolf v Colorado, supra, again for the first time, discussed the effect of the 4th Amendment ~~upon the States~~ upon the States by [its] incorporation through the Due Process Clause of the Fourteenth Amendment. It said:

> ... we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." At p. 28.

Nevertheless, after declaring the 4th Amendment "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause", and announcing that ~~in balance that~~ the Weeks exclusionary rule would not then be carried over against the States as "an essential ingredient of the [Fourth Amendment] right." The Court's reasons for not incorporating in the [Fourth Amendment] [as carried over against the States what had ~~for~~ decades before been posited as [part and parcel of the Fourth Amendment constitutional right against federal encroachment was battened [entirely on factual considerations.

IT "STOUTLY ADHERE[D]" to the Weeks decision, the Court decided that

While they are not [essentially relevant to a decision that the exclusionary rule is part and parcel of the Fourth Amendment as it is visited upon the States through the Fourteenth, we will note these factual grounds on which Wolf was based.

The Court ~~said~~ first stated in Wolf that the "contrariety of views" of the States on the adoption of the exclusionary rule of Weeks was "particularly impressive;" And, in this connection, that it could not "brush aside the experience of the states which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overruling the relevant rules of evidence." At pp. 31-32. We note, however, that since 1949, of the 37 states that have passed on the Weeks exclusionary rule, 21 have by their own decision adopted or adhered to it. ~~now, however, the scales are weighted against the Wolf doctrine on admissibility. Of the 37 states that have passed on the Weeks exclusionary rule since the Wolf decision, 21 have either adopted or adhered to the exclusionary rule.~~

While in 1949, prior to the Wolf case, almost two-thirds of the states were opposed to the use of the exclusionary rule in state cases, ~~that~~ now, despite the Wolf case, 57% of those passing upon it have adopted the Weeks rule. ~~the rule, now 57% of those passing upon it approve. See~~ See Elkins v. United States, ~~supra~~, 364 U.S. 206, Appendix pp. 224-232 (1960).

Significantly, among those now following the rule is California which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . ." People v. Cahan, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911 (1955). In connection with this California case we note that the

We note that the second basis elaborated in Wolf in support of its failure to find the exclusionary doctrine unenforceable is that "other means of protection" have been afforded "the right to privacy." The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other states.[3] In fact, only one case [Monroe v. Pape, 365 U.S. 167] has come to this Court in which private remedies have been pursued in an effort to redress such invasions of privacy. The obvious futility of relegating the Fourth Amendment to the protection of other remedies was well stated by Mr. Justice Frankfurter, dissenting in Harris v. United States, 331 U.S. 145 (1947), in which he said: "Freedom of speech, of the press, of religion easily summon powerful support against encroachment. The prohibition against seizure is normally invoked by those accused of crime, and criminals have few friends"; by Mr. Justice Jackson dissenting in Brinegar v. United States, 338 U.S. 160, 181 (1949), "Courts can protect the innocent against such invasions only indirectly

and through the medium of excluding evidence obtained against those who frequently are guilty," by Mr. Justice Douglas dissenting in Draper v. United States, 358 U.S. 307, 314 (1959), "A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminal"; by Mr. Justice Brennan, dissenting in Abel v. United States, 362 U.S. 217, 248 (1960), "The Amendment's protection is thus made effective for everyone only by upholding it when invoked by the worst of men."

Likewise, time has set its face against the "weighty testimony" of People v. Defore, 242 N.Y. 13, 22 (1926), there Justice [then Judge] Cardozo, ~~holding against~~ rejecting the ~~cited by the Court in support of its reasoning in Wolf. The adoption~~ of the Weeks exclusionary rule in New York, said ~~criticism there~~ that "[T]he Federal Rule as it stands is either too strict or too lax", ~~has been entirely demolished by Elkins, supra, and~~ recent cases of this Court. These include the ~~overruling~~ of the "silver platter" doctrine (~~Elkins~~) and ~~the former~~ requirements as to standing (Jones v. United States, 362 U.S. 257 (1960)), ~~as well as the~~ state use of ~~illegally seized~~ evidence by federal agents (Rea v. United States, 350 U.S. 214 (1956)).

In addition, some five years after Wolf, this Court, in answer to a plea that we overturn its doctrine on the applicability of the Weeks exclusionary rule, indicated that such should not be done until the States had "adequate opportunity to adopt or reject the doctrine." Irvine v California, supra, at 134. There again it was said:

> "Never until June 9, 1949 did this Court hold the basic search and seizure prohibition [of the Fourth Amendment] in any way applicable to the states under the Fourteenth Amendment" at p. 134.

And only last Term in Elkins v United States, supra, (over →) It, therefore, appears beyond question that since 1949 the "basic search and seizure prohibition" have been held applicable to the states and that since that the exclusionary rule of Weeks has not been applied because factual considerations supporting the

It, therefore, plainly appears that the failure of the Court in Wolf to include the Weeks exclusionary rule against the States when it recognized the incorporation of the Fourth Amendment against them in 1949, was based on factual considerations not now controlling. While not wholly irrelevant to our constitutional consideration, we believe this setting could not now be deemed controlling.

~~364 US 206 (1960)~~ The Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" (at p. 212) until the announcement in Wolf "that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule" of the Weeks case. at p. 213. At the same time the Court pointed out, ~~that the "the exclusionary doctrine~~

"the underlying exclusionary doctrine which Wolf established ... that the Federal Constitution ... prohibits unreasonable searches and seizures by state officers" had undermined the "foundation upon which the admissibility of state seized evidence in a federal trial originally rested ..." At p. ___. This "constitutional doctrine of Wolf", the Court added, "operated to undermine the logical foundation of the Weeks admissibility rule ..." The Court concluded | At p. ___. that it was therefore obliged to hold that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. And today the Wolf holding ~~takes~~ leads us, the only door remaining open to close, to hold that all evidence so obtained is ~~admissible~~ constitutionally inadmissible in a state court.

~~I~~ (11)

III

There are in the cases of this Court some passing references to the Weeks rule as being one of evidence.[4] ~~That is, perhaps, because the Court has held that the "scope of our reviewing power over convictions~~ But the plain and unequivocal words of Weeks and its later paraphrase in Wolf (remain entirely undisturbed) ~~in the effect~~ that the Weeks rule is of constitutional origin, ~~In McNabb v United States, 318 US 332, (1943) it was held that although based in the "exercise of its supervisory authority over the administration of criminal justice in~~ In the last case prior to Wolf directly considering the point, "McNabb v United States, 318 US 332 (1943), we note this statement:

> "[A] conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution cannot stand. Boyd v United States... Weeks v United States.... And this Court has, on constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions "secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of the officers was magnified" or "who have been unlawfully held incommunicado without advice of friends or counsel"... at pp 339-341.

Significantly, in McNabb, the Court did formulate a rule of evidence saying, "[2] In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue ... for ... the principles governing the admissibility of evidence in federal

* note them

criminal trials have not been restricted ... to those derived solely from the Constitution" at p. 341

IV

Since the Fourth Amendment has been incorporated through the Due Process Clause of the Fourteenth against the States, it is unpleasable against them in the same manner and ~~that~~ to the same extent as it is against the federal government.

At the time that ~~the Fourth Amendment. When~~ the Court held in Wolf that the Amendment was ~~incorporated~~ applicable to the States through the Due Process Clause, ~~of the Fourteenth Amendment against the states,~~ the cases of this Court, as we have seen, held that as to federal officers the ~~the doctrine that the~~ Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even Wolf "stoutly adhered" to that proposition. ~~was long established and "stoutly adhered to." Wolf, at 28.~~

The doctrine ~~was not a divisible one wherein its sanctions~~ could ~~"be stricken from the Constitution."~~ Therefore, in extending the substantive protections of due process to all unreasonable searches -- state or federal -- it was ~~but~~ logically and constitutionally necessary that the exclusion doctrine -- part and parcel of the Fourth Amendment -- ~~was lost~~ be also ~~a concomitant of~~ an essential ingredient of the ~~new~~ right. In short, the ~~creation~~ admission of the new constitutional right by Wolf could not ~~admit the~~ consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which ~~constitutionally protected from seizure.~~ To hold otherwise is ~~but~~ to grant the right but withhold its privilege and enjoyment.

where incorporated against the States, was not susceptible of destruction by the process of amending its sanctions from the constitutional ~~right protecting~~ ~~they had~~ always theretofore ~~enjoyed~~ under the Boyd, Weeks and Silverthorne cases.

~~to the protection of which it had always been deemed pursuant~~

newly recognized ~~created~~ by the Wolf Case.

an accused had been forced to give by reason of the unlawful seizure.

, rejected today,

Indeed, we know of no such restraint being placed upon the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right "second to none in the Bill of Rights," Harris v. United States, 331 U.S. 145, 157 (dissenting opinion), would therefore stand in marked contrast to all other rights declared by the same instrument as "basic to a free society." Wolf v. Colorado, supra, at p. 27 This 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, including, as it does, the right not to be convicted by use of a coerced confession, however "logically relevant" it be, and without regard to its reliability. Cf. Rogers v. Richmond, 365 U.S. 534 (1961). And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of papers, goods, effects, documents, etc. We find the two relevant Amendments "running into each other," Boyd v. United States, supra, and the philosophy of each to the same — no man is to be convicted on unconstitutional evidence. Cf. Rochin v. California 342 U.S. 165, 173 (1952).

carefully and particularly reserved to the people,

notice and to

Our cases show that the honest and real enjoyment of such rights is wholly determined by the aggregate strength of the available remedies and enforcement devices which an individual and his community are able to muster in their defense. In violations of what other right do we abide unfettered judicial employment of the fruits of official lawlessness" In none, save those of the "core of the Fourth Amendment."

V

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical culmination of ~~Moreover, such a conclusion not only follows our~~ cases, but makes it also very good sense. Presently, a federal prosecutor may take no benefit from evidence illegally seized, but a state's attorney across the street, although he supposedly is may operating under the enforceable prohibitions of the same Amendment, ~~may~~. Thus the state, by admitting evidence unlawfully seized, serves to encourage disobedience to the federal Constitution which it is bound to uphold. Moreover, as was said in Elkins, "[t]The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." At p. 221. Yet the double standard now recognized hardly

Such a conflict, now needless, arose this very Term, in Only this Term in Wilson v Schnettler, 365 US 381 (1961) in which we gave full recognition to our practice in this regard ~~when we refused~~ by refusing to restrain a federal officer from testifying in a state court as to evidence seized by him in the performance of his duties. unconstitutionally

puts such a thesis into practice. Federal officers, being human, ~~are thus~~ were by it invited and, ~~do~~, to and did, as our cases indicate, step across the street, In non-exclusionary states, to the state's attorney with their unconstitutionally seized evidence. ~~The~~ prosecution on the basis of that evidence ~~is~~ was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search ~~were~~ had been inadmissible in both state and federal courts, this inducement to evasion would ~~be~~ have been sooner eliminated. Federal-state cooperation in the solution of crime under constitutional standards ~~would~~ will be promoted, if only by recognition of their then mutual obligation to respect the same fundamental criteria in their approaches. "However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." Miller v. United States, 357 U.S. 301, 313 (1958). Barring shortcuts to only one of two cooperating law

There would be no need to reconcile such cases as Rea and Schwettler, each pointing up the hazardous uncertainties of our heretofore ambivalent approach.

enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. Cf. Byars v. United States, 273 U.S. 28 (1927); Lustig v. United States, 338 U.S. 74 (1949); ~~(1927)~~; Anderson v. United States, 318 U.S. ~~583~~ 350 (1943).

There are those who say, as did Mr. Justice (then Judge) Cardozo, that under ~~such a doctrine~~ "~~T~~[t]he criminal is to go free because the constable has blundered." In some cases this will undoubtedly be the result. But, as was said in Elkins, "~~T~~[t]here is another consideration -- the imperative of judicial integrity." 364 U.S. at p. —. The criminal goes free, if he must, but it is ~~under the law~~ the law that makes him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States, 277 U.S. 438, 469 (1928): "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by example . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites everyman to become a law unto himself; it invites anarchy." The ignoble but doubtless efficient

How constitutional exclusionary doctrine

People v. Defore, 242 N.Y. at 21, 150 N.E. at 587.

shortcut to conviction left open to the state tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the Fourth ~~4th~~ Amendment is enforceable against the States, and that its rights are, therefore, ~~right is nothing less than~~ constitutional in origin, we can no longer ~~abstain from drawing upon the same source for the only concept which will safeguard the right against reduction to the level of a qualified privilege. The judgment is reversed.~~ permit those rights to remain as empty promises rather than solemn constitutional obligations enforceable in the same manner and to like effect as other basic rights secured by our Great Charter.

permit those rights to remain empty promises rather than solemn constitutional obligations enforceable in the same manner and to like effect as other basic rights secured by our Great Charter.

The judgment is vacated and the cause remanded for further proceedings not inconsistent with this opinion.

Add -

Boyd did something else it showed
the inseparable connection between
4th & 5th - same as if compelled
against 5th -

the philosophy is same in relation to
the contest

Chambers - note - Brown -