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 in her possession certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code.[1] The Supreme Court of Ohio in a syllabus to its opinion has found that her conviction is valid even 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 Stat. 427. The State says that even though under our cases the search violated the Fourth Amendment, it is not prevented from using the seized evidence at trial, citing Wolf v. Colorado, 338 U.S. 25 (1949). This Court did ~~so~~ hold, ~~under~~ after reviewing the [attending] circumstances, ~~existing at that time,~~ [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.] ~~However, on this appeal wherein~~ On this appeal wherein

we have noted probable jurisdiction, 346 U.S. 868, we have presented the recurring question of whether it is now timely to review that holding. It is pointed out that in Irvine v. California, 347 U.S. 128 (1954) this Court indicated that the states had not at that time 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. In addition, it is said, that in the past twelve years the basic reasoning of Wolf has been undercut by changed conditions as well as the subsequent development of the case law as to search and seizure, not only in relation to the exceptions previously recognized in the field but also in its application in the administration of justice in our dual federalism. We find much plausible ground in this contention. "The contrariety of views of the states" which Wolf found "particularly impressive" has reversed itself; "the remedies of private action and such

Only last Term in Elkins v United States 364 US 206 the Court pointed out that "the controlling principles" as to search and seizure "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 Weeks v United States, supra. (At p. 213). At the same time, as the Court pointed out, "the underlying constitutional doctrine which Wolf established... that the Federal Constitution ... prohibits unreasonable searches and seizures by state officers" undermined the "foundation upon which the admissibility of state seized evidence in a federal trial originally rested..." This "constitutional

the Court added,

doctrine of Wolf "operated to undermine the logical foundation of the Weeks admissibility rule..." The Court, therefore, held that Weeks and Wolf together rendered inadmissible in a federal trial all evidence obtained by an unconstitutional search and seizure regardless of its source. This eliminated

~~the note further that~~

~~of the the basic criticism~~ ~~the objection of Mr Justice~~

one basic criticism of the federal rule as expostulated by Mr Justice (then Judge) Cardoza that "The Federal rule as it stands is either ~~too~~ too strict or too lax" People v Defore 242 NY 13, 22 (1926)

Moreover since the Wolf decision other events have occurred which undercut its basic reasoning. There it was found that "The contrariety of views of the States" on the adoption of the exclusionary rule of Weeks was "particularly impressive. The Court said 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 p 31-32 Now, however, this scorecard runs against the Wolf doctrine on admissibility. Out of the 37 states that have passed on the Weeks exclusionary rule since the Wolf decision twenty one have either adopted or adhered to the exclusionary rule. While in 1949 almost two thirds of the States were opposed to the rule now 57% of those passing upon it ~~have~~ approve. See Elkins v United States supra Appendix pp 224-232. Significantly, among those now adhering to the rule is California which according

to its highest court, was "compelled to reach that conclusion because other remedies have completely ~~failed~~ failed to secure compliance with the constitutional provisions..." ~~Likewise, in Illinois, an exclusionary state, the statistics indicate that thousands of unconstitutional searches and seizures reach the courts. We note that another~~ People v Cahan, 44 Cal 2d 434, (1955). We note that the second basis elaborated in Wolf in support of its doctrine is that "other means of protection" has been afforded "the right to privacy." ~~We believe that the experience of the States best~~ The experience of California that such other remedies have been worthless and futile is buttressed by the statistics from Chicago where thousands of ~~illegal~~ unconstitutional searches and seizures by police officers occur each year. Still ~~no cases~~ only one case* has come to our attention in which private remedies have been pursued in an effort to redress such invasions of privacy. The answer for the futility of other remedies is well put by Mr Justice Frankfurter, dissenting in Harris v United States 331 US 145 (?, 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." So Mr Justice Jackson ~~in the second~~ in his dissent in found in Brinegar v United States 338 US 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."

*cite

While statistics are not available from New York reliable reports indicate a like situation there.

Discernible time has set its face against the "weighty testimony" of Defore, supra, the sole case cited by the Court in support of its reasoning in Wolf. Besides the reversal in the line-up in the States heretofore mentioned this Court has declared the Fourth Amendment "enforceable" against the States and ~~the~~ in a series of some thirty cases since Wolf has ~~clarified~~ eliminated the incongruities and clarified the obscurities then present. In fact the only basic incongruity now facing us is the double standard this Court now imposes in the enforcement of the Amendment i.e. a federal prosecutor may take no benefit from evidence illegally seized while the states ~~district~~ attorney across the street, operating under the same Amendment, may do just the opposite. ~~Moreover, the phrase~~ Thus the state by admitting evidence unlawfully seized serves to ~~frustrate~~ defeat the obedience to the federal Constitution which it is bound to uphold. ~~Obedience~~ Moreover, as was said in Elkins "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 supports such a thesis. Federal officers, being human, are thus invited and often, as our cases indicate, do in non-exclusionary states step across the street to the states attorney with their unconstitutionally seized evidence and prosecution is had there in utter disregard of the Fourth Amendment. If the fruits of an unlawful search were inadmissible in both state and federal courts this ~~forbidden~~ inducement to evasion would be eliminated and federal-state cooperation in the solution of crime under constitutional

standards would be promoted.

There are those who say, as did Mr Justice (Then Judge) Cardoza that under such a doctrine "The criminal is to go free because the constable has blundered." And in some cases this may be the result. But, as was said in Elkins, in this regard, "there is another consideration - the imperative of judicial integrity." The criminal goes free, if he does, but it is under the law. ~~We hear much of "a government of laws not of men."~~ To say that a government ~~should be permitted to commit crimes in order to convict because~~ should be able to use unconstitutionally seized evidence because an individual is permitted to do so is to overlook the teaching of the ages. Nothing can destroy a government more quickly than its failure to observe its own laws. As Mr Justice Brandeis said in Olmstead v United States 277 US 438, 469: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by example ... If the ~~government~~ government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Seventy five years ago this Court in Boyd v United States 116 US 616 (1886) held that the ~~principles laid down~~ 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... Breaking

into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment" and ~~less than thirty~~ years later in Weeks v United States, 232 US 383 (1914) the Court stated explicitly that "the Fourth Amendment... put the courts of the United States and Federal officials, ~~in the exercise of~~ ~~their jurisdiction and restraints as to the exercising~~ in the exercise of their powers 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." Specifically dealing with the ~~sanctions of the Amendment the Court sustained~~ the use of the evidence unconstitutionally seized the Court concluded:-

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This Court has ~~given these~~ required strict adherence to this command of the Fourth Amendment ever since. We need not pause to ~~to~~ consider whether it has been by rule of evidence or by "judicial implication" for the ~~mandate~~ language of the Weeks case is clear and specific. ~~In~~ Reading that ~~we are bound~~ the prohibitions of the Amendment ~~were made~~ ~~by the framers~~ and "their entombment in the fundamental law of the land" ~~and "enforcement of this doctrine of rights declared by the Federal Constitution, should find~~

It says that "conviction by means of unlawful seizures and enforced confessions ... shocked [not] the conscience of the courts ..."

Now that the Fourth Amendment is "enforceable against the States through the Due Process Clause", Wolf at p. 27, its violation by the States is condemned by the 14th Amendment. In 1949 the Court was of the opinion that the sanction of exclusion of evidence illegally seized was not then thought necessary to meet the "minimal standards assumed by the Due Process Clause". But as we have pointed out conditions and circumstances have changed and ~~as was said in Wolf itself~~ "basic rights do not become petrified as of any one time. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or essentials of fundamental rights." Wolf at p. 27. Experience gleaned during the past twelve years makes it not only "reasonable and right" but necessary to the proper administration of justice in our dual federalism that we have a single standard by which the requirements of the Fourth Amendment be enforced. ~~hold likewise in light of these changed conditions and this Courts advanced standards in the search and seizure field [subsequent to Wolf] would but bring confusion and turmoil in this delicate area. No such limitation is placed on the enforcement of any other basic right~~

We know of no restraints being placed upon the enforcement of any other basic right. The right to privacy, "second to none in the Bill of Rights", Harris v. United States, 331 US 145, 157 (dissenting opinion), would stand in marked contrast to all other rights declared by the same instrument as "basic to a free society." This Court has not hesitated to strictly enforce against the states the right of free speech, of press, of criminal confession, of fair trial, etc. ~~Not one has required such a high degree of judicial self-abnegation as the Wolf rule imposes against the sanction of excluding illegal evidence. Judicial power should not be used as an instrument of lawlessness.~~ Our cases show that the ~~extent and~~ enjoyment of such rights ~~is entirely measured~~ is wholly determined by the aggregate of the available remedies and enforcement devices which the individual and the community ~~has at hand~~ are able to muster in their defense. In not one has the Court exhibited such a high degree of judicial self-abnegation as the Wolf rule imposes on the Fourth Amendment. It appears strange that the force of the state ~~may be interposed against the individual's enjoyment of privacy~~ exercised through lawless action ~~shall be permitted~~ is allowed to be brought to bear against the individual in this one field of search and seizure. ~~It tarnishes~~ The ignoble past thus played by the state tends to the destruction of the ~~very~~ whole system of constitutional restraints on which the Framers placed in the liberties of the people rest. This we cannot permit. ~~It would be less harmful that the criminal go free than that a court permit lawless~~

~~search~~

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.* 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 conclusion was reached in the setting then existing and elaborated in the opinion (5 thirty) [one] States then admitted unlawfully seized evidence while only 17 excluded it, leading to the statement by the Court that it could "not brush aside the experiences of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy... by overriding the relevant rules of evidence." at p 31-32. The Court also felt that any abuses of the rule might be more effectively dealt with by "the internal discipline of the police, under the eyes of an alert public opinion." At p. 31

*Quote.

Four years later we were urged to reconsider the [doctrine] ~~authority~~ of Wolf and to overrule it. [Irvine v California 347 US 128] This the Court refused to do ~~doing~~ 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 twelve a dozen after Wolf we are again urged to reconsider~~ ~~the~~ its ~~doctrine~~ since ~~in the light of the intervening circumstances as well as the rejection of earlier cases~~ ~~just that Wolf~~ ~~which declared the Fourth Amend-~~ ~~Other fr security from ... been~~ ~~ment enforceable against the states~~ ~~as to the admissibility of evidence seized in violation of its command.~~ The argument goes that since Wolf declared the Fourth Amendment "unenforceable" against the states that the Court must enforce it ~~in the~~ with the gloss of the earlier federal cases as to the use of illegal evidence and that circumstances occurring since Wolf was handed down require

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historical and contemporary;
~~historic~~ facts, 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 glass placed upon it by this Court's decisions for the past 75 years and the events occurring since Wolf that we believe

No. 236 - Mapp v. Ohio

Appellant was convicted in the Court of Common Pleas of Cuyahoga County, Ohio, for violation of Page's Ohio Rev. Code, 1953 (Cum. Supp. 1960) § 2905.34, which provides that

> "[n]o person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book, [etc.]. . . ."

Upon appeal, a majority of the Ohio Supreme Court (~~five~~ four of seven judges) found the statute unconstitutional but affirmed the conviction because of a provision of the Ohio Constitution which declares that "[n]o law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges."[1/] 170 Ohio St. 427, 166 N.E.2d 387. We noted probable jurisdiction, 364 U.S. 868.

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."

The two-story brick structure is a two-family dwelling with a full basement. Miss Mapp lived on the top floor with her daughter. When the officers knocked on the door, the appellant came to a window and asked them what they wanted. Failing to receive a satisfactory reply, she telephoned her attorney who advised her to deny the officers entrance unless they had a search warrant. When appellant informed the police of this, they sought reinforcements, which arrived about three hours later. Whether or not they brought a search warrant is disputed. As the Ohio court observed, however, if it did exist it certainly would have described only the policy paraphernalia -- not the obscene material. Apparently the officers

broke in and showed Miss Mapp, who was standing on the stairway, something which purported to be a search warrant. She grabbed the "warrant," allegedly to read it. A struggle ensued in which the officers regained possession of the "warrant." Appellant was ordered handcuffed and taken upstairs to her bedroom. Both the second floor and the 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 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. However, in the light of the Ohio Supreme Court's construction of the statute,[2/] it is immaterial which story the jury believed. The court stated that

"[i]f, as defendant's evidence discloses, defendant took possession and control of these books and pictures when she took possession of the room that had been occupied by her tenant and endeavored to pack up his things for him and, while doing that, necessarily learned of their lewd and lascivious character, then at that instant she had 'in' her 'possession' and 'under' her 'control' a 'lewd or lascivious book ... print [or] picture' as prohibited by this statute." 170 Ohio St. 432, 166 N.E.2d 390.

FOOTNOTES

1. Ohio Const., Art. IV, § 2.

2. The Ohio Constitution does permit a majority of the court to interpret a statute (Art. IV, § 2), which construction is binding upon this Court.

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