SUPREME COURT OF THE UNITED STATES

No. 236.--October Term, 1960.

Dollree Mapp, etc.,	)	
	)	
Appellant,	)	On Appeal from the
	)	Supreme Court of Ohio.
v.	)	
	)	
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 hold, IN THAT CASE, after reviewing the attending circumstances, "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 wherein we have noted probable jurisdiction, 346 U.S. 868, ~~we have~~ THERE IS presented AMONG OTHER ISSUES* the recurring question of whether it is now timely to review that holding. It is ~~pointed out~~ FIRST CALLED TO OUR ATTENTION 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), EXCLUDING EVIDENCE ILLEGALLY SEIZED, 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.

AS INDICATING ADDITIONAL GROUND FOR REAPPRAISAL OF THE PROBLEM, IT IS POINTED OUT THAT Only last Term in Elkins v. United States, 364 U.S. 206, the Court ~~pointed out~~ found 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,~~ WHILE THAT CASE DID NOT RAISE THE QUESTION OF THE APPLICATION OF THE EXCLUSIONARY RULE TO THE STATES, ~~as~~ the Court ~~pointed out~~ EMPHASIZED THAT, "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 doctrine of Wolf," the Court added, "operated to undermine the logical foundation of the Weeks admissibility rule. . . ." The Court, ~~therefore, held~~ CONCLUDED 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 one basic criticism of the federal rule as expostulated by Mr. Justice (then Judge) Cardozo that "The Federal rule as it stands is either too strict or too lax." People v. Defore, 242 N. Y. 13, 22 (1926).~~

IT IS SAID, AND SO WE NOW HAVE THE ANOMOLOUS SITUATION WHERE FEDERAL COURTS ARE REQUIRED TO APPLY THE SANCTION OF EXCLUSION TO ALL EVIDENCE SEIZED IN VIOLATION OF THE 4th AMENDMENT WHILE STATE COURTS MAY RECEIVE SUCH EVIDENCE WITHOUT RESTRICTION, DESPITE THE STATES TOO ARE BOUND BY THE PROSCRIPTIONS OF THE SAME AMENDMENT. FURTHER SITUATIONS ARISING SUBSEQUENT TO Wolf ALSO INDICATE CHANGED CONDITIONS FROM THOSE ON WHICH THE Wolf DOCTRINE WAS BASED. FOR EXAMPLE, THERE IT WAS FOUND

~~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 pp. 31-32. Now, however, ~~this~~ THE scorecard on the States 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~~ ITS exclusionary rule. While in 1949 almost two-thirds of the states were opposed to ~~the rule,~~ EXCLUSION, now 57% of those passing upon it approve OF EXCLUSION. 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 to secure compliance with the constitutional provisions. . . ." 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" have been afforded "the right to privacy." The experience of California that such other remedies have been worthless

and futile is buttressed by the statistics from Chicago where thousands of unconstitutional searches and seizures by police officers occur each year. Still only one case [cite] has come to our attention in which private remedies have been pursued in an effort to redress such invasions of privacy. While statistics are not available from New York, reliable reports indicate a like situation there. The ~~answer for the~~ reason for this futility of other remedies is well put by Mr. Justice Frankfurter, dissenting in Harris v. United States, 331 U.S. 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." As Mr. Justice Jackson found in his dissent 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."

Likewise, time has set its face against the "weighty testimony" of Defore, supra, the sole case cited by the Court in support of its ~~reasoning~~ CONCLUSION AGAINST EXCLUSION in Wolf. Besides the reversal in the line-up in the states heretofore mentioned, this Court has since declared the Fourth Amendment "enforceable" against the states and in a series of some thirty cases since Wolf has eliminated the incongruities and clarified the obscurities ~~then present.~~ THERE criticized.* In fact, the only basic incongruity now facing ~~us~~ THE FEDERAL COURTS is the double standard this Court now imposes in the enforcement of the 4th Amendment, i.e., a federal ~~prose-~~ COURT ~~cutor may take no benefit from~~ MUST EXCLUDE evidence illegally seized, while IN the state ~~'s attorney~~ COURT across the street, ~~operating under the same~~ AGAINST WHOM THE SAME Amendment is enforceable, may permit its use regardless of source. ~~Amendment, may do just the opposite~~. Thus the state, by admitting evidence unlawfully seized, serves to defeat obedience to the federal Constitution which it is bound to uphold. 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,

* "THE FEDERAL RULE AS IT STANDS is either too strict or too lax" People v Defore, supra, at 22.

are thus invited and often, as our cases indicate, do ~~in non-~~ ENTER INTO "WORKING ARRANGEMENTS" WITH LOCAL POLICE WHICH PRODUCE ~~exclusionary states step across the street to the state's attorney~~ SITUATIONS, IF NOT SUBTERFUSES, THAT STRAIN A HEALTHY ~~with their unconstitutionally seized evidence and prosecution is~~ COOPERATIVE SPIRIT BETWEEN FEDERAL AND STATE OFFICERS. A series of cases have come here on this problem since had there in utter disregard of the Fourth Amendment~~. If the~~ Wolf. IF THE fruits of an unlawful search were inadmissible in both state and federal courts, this 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) Cardozo, 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. To say that a government 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 U.S. 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 becomes a lawbreaker, it breeds contempt for law; it invites everyman to become a law unto himself; it invites anarchy."

Seventy-five years ago, this Court in Boyd v. United States, 116 U.S. 616 (1886), 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 indefensible 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 U.S. 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 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." Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded: [copy p. 209, bottom of page]

Elkins v. U.S. - quote of Brandeis dissent ff

This Court has required strict adherence to this command of the Fourth Amendment ever since. We need not pause to consider whether it has been by rule of evidence or by "judicial implication", for the mandate of the Weeks case is clear and specific.

And less than thirty years later, in Weeks v. United States, 232 U.S. 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 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." Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded: [copy p. 209, bottom of page]

> " . . . 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 thus 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." 209,210.

whether it has been by rule of evidence or by "judicial implication", for the mandate of the Weeks case is clear and specific.

It says that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments 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 Fourteenth Amendment. In 1949 the Court was of the opinion that the sanction of exclusion [IN STATE COURTS] of evidence illegally seized was not then thought necessary to meet the "minimal standards assured by the Due Process Clause." But as we have pointed out, conditions and circumstances have changed and "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. 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 Rifhts," Harris v. United States, 331 U.S. 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 fair trial, counsel, confessions, etc. Our cases show that the enjoyment of such rights is wholly determined by the aggregate of the available remedies and enforcement devices which the individual and the community 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 exercised through lawless action is allowed to be brought to bear against the individual in this one field of search and seizure. The ignoble part thus played by the state tends to the destruction of the whole system of constitutional restraints on which the liberties of the people rest. This we cannot permit.