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 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 has 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, 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."[1] On this appeal, wherein we have noted probable jurisdiction, 346 U.S. 868, we have once again presented for our consideration the recurring question of whether it is now timely to review that holding.

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 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, as the Court in Elkins 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 doctrine of Wolf," the Court added, "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~~. Thus was eliminated one basic criticism of the federal rule as characterized 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, ~~[illegible]~~ 150 N.E. 585, — (1926).

Moreover, since the Wolf decision there have occurred other events which undercut its basic reasoning. There it had been 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, 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 almost two-thirds of the states were opposed to the rule, ~~now~~ 57% of those subsequently passing upon it now approve. See Elkins v. United States, supra, Appendix pp. 224-232. Significantly, among those now following the exclusionary 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 [redacted] (1945).

is this really valid?

We note that ~~the second~~ another 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 statistics from the City of Chicago where thousands of illegal searches and seizures by police officers occur each year. Still there have been only cases in Illinois Courts, and only one case, Monroe v. Pape, 365 U.S. ____ (19), 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, 156 (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;" and by Mr. Justice Brennan, dissenting in Abel v. United States, 362 U.S. 217, 248 (1960); "The [Fourth] 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 Defore, cited by the Court in support of its reasoning in Wolf. Besides the subsequent reversal in the state trend towards admission, this Court, in more than a score of cases since Wolf, has corrected the logical faults mentioned in Irvine as reason enough then to further postpone evaluation of the need for constitutionally documenting the application of the Weeks rule to the states. For, as of that time, this Court had not "seen fit to exclude illegally seized evidence in federal cases unless a federal officer perpetrated the wrong," Irvine v. California, supra, at 136. However, but only last year that objection was disemboweled by our decision in Elkins. Similarly, as of the Irvine decision, the limits on availability of the remedy of exclusion required "some proprietary or possessory interest in that which was unlawfully searched or seized," at p. 136,

whereas today, in light of Jones v. United States, 362 U.S. 257 (19), all that is required is that the person asserting the right to exclusion have been "legitimately on the premises." At p. 267. Not long after Irvine, and as a consequence of withholding application of the Weeks rule, a weak extension of it to affect State judicial use of unlawfully seized evidence tendered by federal agents was effected not through constitutionally imposed restraints, but through exercise of a disciplinary power over the agents. Rea v. United States, 350 U.S. 214 (19). Even that exercise has narrow limits, however, and will not be made in every case. Wilson v. Schnettler, 365 U.S. 585 (19).

In fact, the only basic incongruity now facing us is the double standard ~~this Court tolerates~~ existing in the enforcement of the Amendment. A federal prosecutor may take no benefit from evidence illegally seized, but a state's attorney across the street, operating under the enforceable prohibitions of the same Amendment, may. Thus the state, by admitting evidence unlawfully seized, indirectly ~~secures to~~ serves to encourage disobedience to the federal Constitution which it is bound to uphold. Moreover, as was said in Elkins, [1] "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 puts such a thesis into practice. In non-exclusionary states, federal officers, being human, are thus invited to and do, 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 then had in a state court in utter disregard of the Fourth Amendment. If the fruits of an unconstitutional search were inadmissible in both state and federal courts, this inducement to

evasion would be eliminated. Federal-state cooperation in the solution of crime under constitutional standards would 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 short-cut methods in law enforcement impairs its enduring effectiveness." Miller v. United States, 357 U.S. 301, 313 (1958). Proscribing shortcuts to only one of two cooperating law 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); Anderson v. United States, 318 U.S. 350 (1943).

There are those who say, as did Mr. Justice (then Judge) Cardozo, that under such a doctrine [t] "The 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] "There is another consideration -- the imperative of judicial integrity."

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

The criminal goes free, if he must, 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 ignore the teaching of history. 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 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."

Seventy-five years ago, this Court in Boyd v. United States, 116 U.S. 616, 630 (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 indefeasible right of personal security, personal

liberty and private property. . . ." If that be the case, does it adequately safeguard the "indefeasible right of personal security" to ~~relegate~~ limit him who suffers its invasion only to a suit for damages for the "breaking of doors"? Less than thirty years later, in Weeks v. United States, ~~232 U.S. 383 (1914)~~ supra, the Court stated explicitly that

> "[T]he 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." 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." ~~232 U.S. 383, 391-393.~~ at pp. 391-393

This Court has required of federal law ~~enforcers~~ officers a strict adherence to this command of the Fourth Amendment ever since. More than a mere rule of evidence, the mandate of the Weeks case is a clear, specific, and constitutionally required "judicial implication" of a safeguard without insistence upon which the Fourth Amendment is reduced to "a form of words." Holmes, J., Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). It means, 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, ~~232 U.S.~~ at 392.

1/ The Fourth Amendment is "enforceable against the States through the Due Process Clause," Wolf v. Colorado, supra, at p. 27, its violation by the States ~~being~~ is condemned by the Fourteenth Amendment. In 1949 the Court was of the opinion that the sanction

of exclusion of evidence illegally seized was not then necessary to meet the "minimal standards assured by the Due Process Clause." But as we have pointed out, conditions and circumstances have changed and

> "[B]asic 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." ~~At p. 27.~~ Wolf v. Colorado, supra, at 27.

What has occurred in the course of maturation of the Wolf doctrine makes unnecessary our further hesitation "to treat this remedy as an essential ingredient of the right." Ibid. If as to Irvine the time was not yet ripe, the reasons for that judgment are neither so plausible nor so persuasive today. It is time "to advance in . . . standards of what is deemed reasonable and right," to recognize as necessary to the proper administration of justice by dual sovereigns that there be a single standard under which the fundamental right 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 Rights," Harris v. United States, ~~331 U.S. 145~~, supra, at 157 (dissenting opinion), would stand in marked contrast to all other rights declared by ~~the same instrument~~ this Court as "basic to a free society." 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 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. ___ (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.

Where does this fit in?

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~~ is able to muster in their defense. With no other right ~~In no one~~ has the

Court exhibited such a high degree of judicial self-abnegation as would be involved in our further hesitation to take a step made possible by Wolf and promised by Irvine. 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." The ignoble but doubtless efficient route to conviction left open to the state tends by its very efficiency to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the 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.

Marshall v. Riley, 7 Ga. 367 (1849) - ct held question on discovery violated self-incrimination - need not answer or, alternatively, could answer but object to introduction at trial.

Rusher v State, 94 Ga 363 (1893) - Δ told officers where money was hidden. Ct said if Δ's story had been restated by testimony it would be inadmissible because the finding of the money would be an incriminating fact.

State v. Flynn, 36 NH 64 (1858) - Illegality is immaterial to admission

Underwood v. State, 78 SE 1103 (Ga. 1913) - Police forced Δ to give them key to safe - held, contents inadmissible. Ct noted however, that if officers had merely broken in safe without coercing Δ, evidence would have been admissible. (self-incrimination seems to be the distinction)

Irvine decision, the limits on availability of the remedy of exclusion required "some proprietary or possessory interest in that which was unlawfully searched or seized," at p. 136, whereas today, in light of Jones v. United States, 362 U.S. 257, all that is required is that the person asserting the right to exclusion have been "legitimately on the premises." At p. 267. Not long after Irvine, and as a consequence of ~~withholding~~ (further delaying) application of the Weeks rule, a ~~weak extension of it to affect State judicial use of unlawfully seized evidence tendered by federal agents was effected not through constitutionally imposed restraints, but through exercise of a disciplinary power over the agents.~~ (To the States, we were obliged through the use of disciplinary power to require injunctive action against federal agents in order to prevent State judicial use of evidence previously found unlawfully seized and not admissible in a federal court. But even that ~~supervisory~~ use of our supervisory power is often ineffective,) Rea v. United States, 350 U.S. 214. ~~Even that exercise has narrow limits, however, and will not be made in every case.~~ Wilson v. Schnettler, 365 U.S. 585, and points up the more the hazards present in the recognition of a double standard in the enforcement of Fourth Amendment rights.

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Reversed