Institute of Judicial Administration

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MEMORANDUM ON SEARCH AND SEIZURE

From: Professor Gerhard Mueller

To: Mrs. Fannie Klein

Let me begin my comments by talking about the rule of the admissibility of criminal evidence in New York in general terms. This would include real evidence, obtained in violation of the right to be free from unreasonable searches and seizures, as well as testimonial evidence, obtained in violation of the freedom from self-incrimination, the right to counsel, the right to prompt arraignment before a magistrate, and so on. There is a New York statutory provision to the effect that property taken under a search warrant which is not the property described in the warrant, or taken on a warrant improvidently issued (no probable cause for believing the existence of the grounds on which the warrant was issued) must be restored by order of the magistrate. (Code Crim. Proc. §809). This section would seem to dictate an exclusionary rule in New York. However, the statute, applicable of course only to searches conducted with warrants, is quite frequently disregarded and as to property taken without a warrant it is not applicable at all. As a matter of fact, New York has no exclusionary rule. The leading New York case on the issue of the admission of illegally obtained evidence is People v. Adams, 176 N. Y. 351, 68 N. E. 636 (1903), affirmed in Adams v. People, 192 U. S. 585, 8 L. Ed. 575 (1904). In that case the police officers told the defendant that they had a search warrant when in fact they did not, and then they illegally seized papers used in a gambling enterprise

and other private papers of the accused. The evidence was competent and thus held admissible. A similar leading case is People v. DeFore 242 N. Y. 13, 150 N. E. 585 (1926). In that case the defendant was arrested for the misdemeanor of larceny of an overcoat worth less than $50.00. The arrest was without warrant and therefore contrary to the New York law to the effect that all arrests for misdemeanor not committed in the presence must be made with a warrant. Thus, the ensuing search incidental to the arrest was likewise illegal. There is little doubt that the trial court knew the rule, but nevertheless it admitted it and the court of appeals sustained this conviction. The evidence was simply found to be competent and hence admissible. These two cases have been strong precedents for later courts when faced with similar issues. Within the last twenty-five years there have been remarkably few reported New York cases allowing illegally obtained evidence into the trial. The reason usually lies with the District Attorney who apparently does not abuse this virtual right to obtain convictions on unlawfully obtained evidence. In any event, there is no indication of widespread abuses in New York. Of the few reported decisions, fewer yet have been clear-cut cases. One of these is People v. Lacombe, 170 Miss. 669, 9 N. Y. Supp. 2d. 877, City Magistrates Court, New York City, Ninth District, Borough of Brooklyn (1939), where the crime of book-making was involved. Here, the officer searched and seized without a warrant when one should have been obtained. Another and similar case is People v. Rickter's Jewelers Inc., 291 N. Y. 161, 51 N. E. 2d., 690 (1943) in which the officer asked to see an advertised ring and then refused to give it back to the dealer until it was examined in connection with a false advertisement charge.

A third clear-cut case is People v. Belsky, 177 Miss. 125, 29 N. Y. Supp. 2d. 535, Kings County Court (1941) in which books and papers seized under an income tax evasion charge under an improper subpoena duces tecum were involved.

Occasionally we find a case in which there is a reasonable dispute as to whether or not the property was unlawfully seized. One such case was People v. Kuhn, 172 Miss. 1097, 15 N. Y. Supp. 2d. 1005 (1939) in which the court decided that the question was irrelevant anyway since, whether lawfully obtained or not, the evidence seized was nevertheless admissible because relevant. Occasionally the court will brusquely rule that the evidence was lawfully obtained and then add by way of dictum, that even if it had not been lawfully obtained, it would nevertheless be admissible. See People v. Velella, 200 N. Y. Supp. 2d., Court of General Sessions, New York County (1960) in which tape recorded evidence was sought to be introduced. See also People v. Lanza, 199 N. Y. Supp. 2d. 598 (First Department, 1960). I don't think I should go on into the problem of wire-tapping at this point although, of course, special rules have grown around the wire-tapping controversy. In the wire-tapping cases the New York Courts, on the whole, have been reluctant to admit wire-tapped evidence because, although lawful in New York, it is always /obtained in violation of Federal law. As you know, the Supreme Court has recently resolved this controversy so that it needs no further comment at this point.

Despite everything I have said, there are a few cases in New York in which a court ruled that evidence unlawfully obtained must be returned and cannot be used at the trial. For example, in application of

Solfa, 5 Miss. 2d. 375, 159 N. Y. Supp. 2d. 68, Supreme Court Special Term, New York County, Part One (1957), the court allowed a motion by a defendant charged with illegal practice of dentistry, for the return of dental instruments and a hypodermic syringe. The court was emphatic on the point that the evidence was admissible. Nevertheless, it ruled that it had to be returned since unlawfully obtained, even though such return would result in a probable destruction of the evidence before trial. The court leaned heavily on Article 78 of the Civil Practice Act. Relying on a Common Law motion, rather than on a statutory motion, in in re Atlas Lathing Corp., 176 Miss. 959, 29 N. Y. Supp. 2d. 458, Supreme Court, Kings County (1941), a court also allowed the return of illegally seized evidence (books seized by an improper subpoena duces tecum), and here the court emphatically said that the evidence was illegally seized and therefore inadmissible. This ruling is hard to understand.

Let me now go directly to the confession cases. Obviously neither on the real evidence cases nor on the confession cases are there any statistics available as to the behavior of the judiciary. It is interesting to observe, however, as I noted over the last several years, while writing the Annual Survey of American Law, that there are not many New York confession cases which reach the Federal court under claimed violations of Fourteenth Amendment due process rights. A few cases do and these are usually very close cases in which the state remedies are obviously exhausted and the case had been conscientiously tested in the New York courts. For example, in United States v. Denno, 261 Federal 2d. 511 Second Circuit (1958) certiorari denied, 358 U. S. 945 (1959), the Second Circuit found no coercion of a constitutionally impermissible degree.

This, of course, was in accordance with the finding of the New York courts. This seems to show that the New York Appellate courts are doing a pretty good job in disciplining their own police and their own lower courts. See for example People v. Dibiasi, 7 N. Y. 2d. 544, 166 N. E. 2d. 825 (1960) in which the New York Court of Appeals goes way beyond the requirements of the Supreme Court's holding in the Spano case. In the Dibiasi case the New York Court of Appeals held prejudicial error on admission by the defendant which he had made in the absence of counsel prior to trial but after the indictment. The standard, thus, is tougher than that required by the United States Supreme Court. Or, take for example the decision of the Supreme Court, Appellate Division, Fourth Department, in People v. Shenandoah, 10 Appellate Division, 2d. 342, 199 N. Y. Supp. 2d. 960, Fourth Department (1960), in which a thirty-nine hour holding prior to arraignment was regarded as prejudicial even though the defendant had taken no exception to a contrary ruling in the trial court. (See also the cases discussed in the Shenandoah decision). This is a mere delay case and thus it, too, imposes a tougher standard than that required by the Supreme Court. To the same effect is People v. Kelly, 8 Appellate Division 2d. 478, 188 N. Y. Supp. 2d. 663 (Fourth Department, 1959). In the old Spano case [while I am saying "old", it is really only from 1958] (4 N. Y. 2d. 1056, 150 N. E. 2d. 226, 173 N. Y. Supp. 2d. 793, 1958) the Court of Appeals had upheld the conviction even though the defendant's confession was obtained in violation of state law. But there was absolutely no coercion in that case, simply a slight delay of a nature which probably would even have passed a much stricter

federal test which the federal courts impose upon the federal police.

I would like to recapitulate: the situation in New York is not bad. It is not common for the prosecutor to offer and for the courts to receive evidence obtained in violation of law, even though unlawfully obtained evidence or confessions are admissible, theoretically speaking. But there is an upper limit, and in this upper limit the New York courts frequently seem to go beyond the requirements of the federal courts in upholding due process protections of a fourteenth amendment nature.