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Admissibility of Evidence Obtained By Unlawful Search and Seizure - Sugarman v. State

ADMISSIBILITY OF EVIDENCE OBTAINED BY UNLAWFUL SEARCH AND SEIZURE

Sugarman v. State[1]

A police officer arrested the defendant-appellant upon his mere suspicion that the defendant was engaged in the operation of a lottery. While walking to the station house with the officer, the defendant asked to be released, promising the officer to "make it all right with you". Upon the officer's refusal, the defendant broke away, escaped, but was later recaptured and placed in a cell in the police station. The police secured a warrant to search the defendant's automobile, in which they found certain lottery tickets. The defendant was subsequently indicted and convicted of the crime of having in his possession lottery tickets and other paraphernalia used in carrying on a lottery. The defendant appealed on the ground that the lottery tickets found in his cell and in his car were inadmissible in evidence. *Held*, reversed and remanded. The defendant was illegally arrested in the first instance; and thus his offer to the police officer to "make it all right" with him was not an attempt to bribe, for the act of the defendant did not amount to influencing a public official in the performance of his duty, as bribery is defined in the Code.[2] A police officer in making an *illegal* arrest is not performing his official duty. Therefore the second arrest was also illegal, and the lottery tickets found in his cell were not admissible in evidence under the Bouse Act.[3] That act forbids in the trial of misdemeanors the utilization of evidence illegally obtained. As to the

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[1] 195 Atl. 324 (Md. 1937).
[2] Md. Code, Art. 27, Sec. 31.
[3] Md. Code Supp., Art. 35, Sec. 4-A.

tickets found in the automobile the Court held that a warrant to search an automobile for lottery tickets was not recognized at common law; and since there is no statute authorizing such a warrant, it was invalid. As a consequence the tickets discovered in the defendant's car were also inadmissible under the Bouse Act.

The case presents the questions of what is bribery and when may a search warrant issue for the purpose of securing evidence. It also gives an opportunity to review the cases interpreting the Bouse Act.

A perusal of the authorities assures us that the Court of Appeals was well supported in holding that in making the illegal arrest, the officer was not in the performance of his duties and that consequently he could not be the object of a bribe. The precise question that confronted the Maryland Court in the instant case was before the Texas Court of Criminal Appeals which decided,[4] following what is the overwhelming weight of authority, that an offer to make a gift of money to an officer who has illegally arrested a suspect was not an attempt to bribe because the officer was not carrying out his official duty.

In a Missouri case[5] an offer to a member of the Board of Health of St. Louis to influence his vote in awarding a contract for the disposal of the city garbage was held not a bribe because the City Council did not have the power to place such authority in the Board of Health, and thus the Board was not in the performance of its duty. This case thoroughly discusses the problem and, in the course of the lengthy opinion, considers a great portion of the authority appertaining thereto.

Where there is an offer to a city councilman to cast his vote for a certain individual to fill a public office, it has been held that bribery was not present when the office did not exist.[6] Upon corruptly procuring a city attorney to advise the City Council to make a contract, even though the city did not have authority to contract in that particular instance, the accused was found guilty of bribery, for it was the attorney's duty to advise the council.[7] On several occasions City Councilmen have been convicted of accepting bribes influencing their votes notwithstanding the fact that

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[4] Moore v. State, 44 Tex. Cr. R. 159, 69 S. W. 521 (1902); Ex Parte Richards, 44 Tex. Cr. R. 561, 72 S. W. 838 (1903).

[5] State v. Butler, 178 Mo. 272, 77 S. W. 560 (1903).

[6] Kitby v. State, 57 N. J. L. 320, 31 Atl. 213 (1894); People v. Purley, 2 Cal. 564 (1852); Newman v. State, 97 Ga. 367, 23 S. E. 831 (1895).

[7] People v. McGarry, 136 Mich. 316, 99 N. W. 147 (1904); State v. Lehman, 182 Mo. 424, 81 S. W. 1118 (1904).

the ordinance in question was illegal.[8] One who had given money to a Federal meat inspector to permit the sale of diseased meat was acquitted on the ground that the act of Congress under which the inspector derived his authority was unconstitutional.[9]

The problem that arises in these cases is the question of determining when an official is performing his duty. It would seem that a police officer is carrying out his official duty in making an illegal arrest to the same extent as a sheriff who releases liquor in his possession which he has no authority to release;[10] or a coroner, legally acting as a committing magistrate, who has assumed jurisdiction over a case which was definitely not within his jurisdiction.[11] Nevertheless, despite what may be the individual's view as to the wisdom of permitting one, who has undoubtedly attempted to influence a public official, to escape punishment or of allowing the official to essay a breach of his public trust, the authorities are practically unanimous in support of the contention that an illegal arrest is not within the performance of the duties of a police officer; and that one who offers the policeman remuneration for allowing him to avoid such an arrest is not guilty of bribery or of an attempt to bribe.

With regard to the warrant to search the automobile, the Court of Appeals held that since no such warrant was authorized at common law and since there is no statute permitting its issuance, the search was illegal. In the first stages of the common law, the search warrant was frowned upon, but gradually was recognized as a necessary instrumentality for the obtention of stolen goods. However, during the reigns of the Stuarts the power of the search warrant was extended to the search of homes and private effects for not only stolen goods, but also libelous matter. As the Eighteenth Century progressed, the status of this warrant became more confused until in 1765 it was decided in *Entick v. Carrington*[12] that a search warrant could be issued only for the purpose of obtaining stolen goods. And, indeed, it seems that the abuse of the privilege to use this warrant was the cause of the Fourth Amendment to the Constitution

[8] Murphy v. State, 124 Wis. 635, 102 N. W. 1087, 107 N. W. 470, 111 N. W. 511 (1905); State v. Campbell, 73 Kan. 688, 85 Pac. 784 (1906); Glover v. State, 109 Ind. 391, 10 N. E. 282 (1887).

[9] United States v. Boyer, 85 Fed. 425 (1898). See also United States v. Gibson, 47 Fed. 833 (1891).

[10] State v. Potts, 78 Iowa 656, 43 N. W. 534 (1889).

[11] People v. Jackson, 191 N. Y. 293, 84 N. E. 65 (1908).

[12] 2 Wils. K. B. 275, 95 Eng. Rep. 807, 19 How. St. Trials 1030 (1765).

of the United States and similar provisions in the State Constitutions against unreasonable searches and seizures.[13]

Although there is little case authority on the point, it is apparent that at common law a search warrant would issue for stolen goods only, but that statutes may authorize such warrants for other purposes, so long as the act meets the requirements of the particular State constitutional provision against unreasonable searches and seizures.[14]

Although the Court of Appeals has not *expressly* confined the search warrant to stolen goods, it has indicated that only the common law warrant and those warrants permitted by statute will issue. Therefore, from the language in the principal case[15] one can be safe in assuming that in Maryland a warrant to search for stolen goods and a warrant authorized by statute to obtain property other than stolen goods are the only search warrants sanctioned by law. However, it must be remembered that if the procedure under the statute does not meet with the requirements of Articles 22 and 26 of the Declaration of Rights granting the right to an individual not to give evidence against himself and forbidding certain searches and seizures, the act will itself be adjudged unconstitutional.

The legislature has seen fit to provide for the issuance of search warrants in several instances. When the complainant has reason to believe and does believe that the laws in relation to cruelty to animals are being violated, a magistrate may issue a search warrant directing an officer to search the building in order to discover the evidence of guilt.[16] A warrant may issue for the purpose of searching premises and apprehending a deserting seaman.[17] In Baltimore City a warrant will issue to search any premises for gunpowder kept within the city in violation of the city code.[18] A search warrant may also be used to obtain from premises evidence of guilt in violating the law prohibiting milk cans to be used for other purposes.[19] Evidence of a

[13] Cornelius on Searches and Seizures, 88; Entick v. Carrington, supra note 12. Relying on the Entick case, Halsbury's Laws of England, Vol. 9, Sec. 625, and Bishop's New Criminal Procedure, fourth edition, Secs. 240, 241, limit the warrant to a search for stolen property. See also Cornelius on Searches and Seizures, 88; Hochheimer, Criminal Law, 370; State v. Best, 8 N. J. Misc. 271, 150 Atl. 44 (1930); Montana v. Chinook Township, 45 Mont. 375, 123 Pac. 405 (1912); Newberry v. Carpenter, 107 Mich. 567, 65 N. W. 530, 61 Am. S. R. 346, 31 L. R. A. 163 (1895).

[14] Newberry v. Carpenter, supra note 13; Bishop's New Criminal Procedure, Fourth Edition, Secs. 240, 241.

[15] See also Meisinger v. State, 155 Md. 195, 141 Atl. 536 (1928).

[16] Md. Code, Art. 27, Sec. 78.

[17] Md. Code, Art. 84, Sec. 2.

[18] Baltimore City Code, Art. 13, Secs. 78-84; especially Sec. 83.

[19] Md. Code, Art. 27, Secs. 369, 371.

violation of the opium laws can be seized by a search warrant.[20]

Although some States have statutes providing for a general warrant to search for evidence, Maryland has evidently placed a definite limitation on the extent of the warrant and by the recent decision in the principal case has given to the individual a greater protection over his personal rights.

Prior to the Bouse Act,[21] evidence secured through an illegal search was admissible in Maryland in a criminal case[22] and it is evident that the great weight of authority in this country and England supported that view.[23] In 1886 the Supreme Court of the United States handed down an opinion in *Boyd v. United States*[24] in which it was held that the Fourth and Fifth Amendments to the Constitution were so related that the Fifth Amendment could be invoked by an accused to prevent evidence, illegally seized, from being introduced at the trial. In 1904 the Supreme Court repudiated the doctrine in *Adams v. New York*,[25] but soon readopted it in 1914 by its decision in *Weeks v. United States*.[26] The new view pronounced by the Supreme Court came as a great surprise, because it was directly contrary to well established law. Since 1914 various State Courts have approved and accepted the principle laid down in the *Weeks* case, until at present eighteen States follow the Federal rule of inadmissibility and twenty-six the rule of admissibility.[27]

Such an overthrow of settled law was bound to cause great criticism, and Dean Wigmore in his work on Evidence,[28] takes a strong and bitter stand against the modern view. The reasoning supporting the admissibility of evidence obtained illegally is stated clearly and concisely in *Meisinger v. State*.[29]

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[20] Md. Code, Art. 27, Sec. 422. With respect to game illegally in the possession of an individual see Md. Code Supp., Art. 99, Sec. 10. Md. Code, Art. 27, Sec. 259, requires police officers "to visit all places where they shall have reason to suspect gaming tables are kept". Whether this authorizes the seizure of evidence without a search warrant is a matter of conjecture. If it does, there is the question of its constitutionality in light of Art. 22 and Art. 26 of the Maryland Declaration of Rights.

[21] Supra note 3.

[22] Meisinger v. State, supra note 15.

[23] See Wigmore, Evidence, (Second Edition) Secs. 2183, 2184; and annotations, 24 A. L. R. 1408, 32 A. L. R. 408, 41 A. L. R. 1145, 52 A. L. R. 477, and 88 A. L. R. 348.

[24] 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524 (1886).

[25] 192 U. S. 585, 48 L. Ed. 575, 24 Sup. Ct. Rep. 372 (1904).

[26] 232 U. S. 383, 58 L. Ed. 652, 34 Sup. Ct. Rep. 341 (1914).

[27] Supra note 23

[28] Loc. Cit. supra note 23.

[29] Supra note 15.

> "In the trial of a criminal case, the admissibility of evidence is to be determined by its pertinency to the issue under consideration, and the Court is not concerned with the collateral question of how such evidence may have been procured. The question of guilt or innocence of the accused cannot be affected by its method of procurement, if the evidence is in itself germane and pertinent to the issue to be decided."

Courts which take this view contend that the necessity of convicting one who is guilty of a crime outweighs the protection of civil liberties, especially when the accused has a remedy against the one who has invaded his privacy. Those who adhere to the opposite view of inadmissibility support their stand by maintaining that if evidence obtained illegally is admitted, the individual has no means of protecting himself from the authorities, for his civil action against the wrongdoer is very often an inadequate remedy.[30]

The legislature of Maryland has apparently recognized the worth of each of these arguments and has sought to balance the interests between the necessity to protect society from crime and the desirability of guaranteeing the individual his personal rights. To effectuate this conception, the Bouse Act was passed in 1929 and by that statute evidence secured by an illegal search and seizure is made inadmissible in the trials of misdemeanors. Since the legislature has not taken a stand with regard to felony trials, the common law of Maryland is presumed to be in effect; accordingly, evidence obtained illegally is still admissible in trials of felonies.

Since 1929 there have been several cases decided under the Bouse Act. If we read together the cases of *Heyward v. State*,[31] and *Gorman v. State*[32] we find that an accused arrested in a house, access to which was gained without a search warrant and thus illegally, cannot prevent the admission of evidence found in the house which was the property of another nor can he assert that the arrest was illegal when he admitted to the officer that he was guilty. But the owner of the house, who was also indicted for a violation of the lottery laws, can prevent the admission of tickets found in the house because the search was illegal and unreasonable, there not being a search warrant.

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[30] See: Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 114; Annotation, 88 A. L. R. 348; Wigmore, loc. cit. supra note 23.

[31] 161 Md. 685, 158 Atl. 897 (1931).

[32] 161 Md. 700, 158 Atl. 903 (1931).

In *Blager v. State*[33] where a police officer asked the defendant for the lottery tickets in his pocket and the defendant complied with the request, the Court held that the tickets would be admitted in evidence because the arrest was legal in that the offense was committed in the presence of the officer. Also a search of the accused's person in conjunction with a legal arrest is not contrary to the Declaration of Rights.[34]

In *Baum v. State*[35] the Court held that "one cannot complain of an illegal search and seizure of premises and property which he neither leases, owns, nor controls, nor lawfully occupies, nor rightfully possesses, or in which he has no interest". So without deciding whether the particular search was legal or not, the court admitted the evidence thus obtained on the ground that the right of protection from illegal search and seizure is a guarantee to one against invasion of his privacy in his home and papers.

In the instant case of *Sugarman v. State* the Court has gone further and laid down the rule that the guarantee of privacy extends to an automobile belonging to a citizen. Some jurisdictions have held that an automobile is not such a place for search of which there must be a warrant. Others make the question turn on the point whether the automobile is in a public or private place.[36] But whatever the rule of other States, in Maryland under the principal case an automobile in a public place is a subject protected by the Declaration of Rights. From that it would seem that to search an automobile no matter where it may be, a warrant is necessary and, for lack of a general statutory provision, none may be procured, save in the specific instances set out above, which do not include lottery cases.

If the legislature has sought to balance the interests between the two social policies of punishing those who have committed crime and of protecting the citizen's private rights by passing the Bouse Act, then the legislature has evidently felt it to be more desirable to punish one for a felony in spite of the invasion of a privacy. Due to the less serious nature of the crime the legislature has been willing to hazard the guilty one's escape from punishment for a misdemeanor in order to assure the individual of his privacy in his home. If that be the aim of the statute, as

[33] 162 Md. 664, 161 Atl. 1 (1932).

[34] See Callahan v. State, 163 Md. 298, 162 Atl. 856 (1932), approving of a search incident to arrest.

[35] 163 Md. 153, 161 Atl. 244 (1932).

[36] See Milam v. United States, 296 Fed. 629 (1924); People v. Case, 220 Mich. 379, 190 N. W. 289 (1922); Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 Sup. Ct. Rep. 280 (1925); 56 C. J. 1194 et seq.

it appears to be, then the legislature has overlooked the fact that in Maryland we do not differentiate between a felony and a misdemeanor on the basis of the gravity of the crime as measured by anti-social conduct and the relatively heavier punishment received for felonies. On the contrary the State has retained the old common law distinction between felony and misdemeanor. Therefore, some of our greatest crimes, insofar as anti-social conduct and long-term sentences in the penitentiary are concerned, are misdemeanors. For instance assault with intent to rob or murder is a misdemeanor, punishable by up to ten years in the penitentiary; assault with intent to rape is also a misdemeanor, carrying with it *death, life imprisonment* or up to twenty years in the penitentiary.[37]

From the above we can see that the legislature has not entirely accomplished its supposed purpose. As Dean Wigmore remarks, we can visualize a group of felons conspiring to destroy the City of Baltimore, but the State could not introduce in evidence an infernal machine seized by the police in the house out of which the accused were operating, for neither the common law nor a statute authorize a search warrant. And unless the police officer can ascertain the commission of a crime within through one of the five senses, a search without a warrant is illegal.[38] Since a conspiracy is a misdemeanor[39] and since the evidence was obtained through an illegal search, it would be inadmissible.[40]

Although one may grant that the line of distinction the legislature has attempted to draw is the solution to the problem of admissibility of evidence illegally obtained, and that it is an improvement over the two conflicting rules as laid down by the federal courts on the one hand and the old common law on the other, it cannot achieve the desired end so long as the peculiar Maryland distinction between felony and misdemeanor exists in the form of the common law principle.

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[37] Md. Code Supp., Art. 27, Sec. 17; Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914).

[38] Gorman v. State, supra note 32.

[39] Md. Code and Md. Code Supp., Art. 27, Secs. 43, 43A. Archer v. State, 145 Md. 128, 125 Atl. 744 (1923).

[40] Md. Acts, 1933, (Extra Session), Ch. 2, Secs. 5, 34, and Zukowski v. State, 167 Md. 549, 175 Atl. 595 (1934). One who has license to sell alcoholic beverages consents to a search without warrant. *Quaere:* What is the result when liquor is being sold or manufactured without a license? See Meisinger v. State, supra note 15.