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Federal Policy Regarding Evidence Illegally Seized - Rea v. United States

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Federal Policy Regarding Evidence Illegally Seized

Rea v. United States[1]

Federal narcotics officers, under a void search warrant, arrested petitioner, George Rea, and seized marihuana in his possession. Rea was then indicted in the United States District Court for the District of New Mexico for violation of the Marihuana Tax Act, and while awaiting trial, moved that the evidence so obtained be suppressed. The motion was granted and the district attorney then moved for dismissal.

Thereafter, upon complaint signed by a federal narcotics officer, petitioner was indicted in a New Mexico state court for having been in possession of marihuana contrary to a local criminal statute. Before trial in the state proceeding, petitioner again went to the federal court, filing a motion for a contempt show cause order to enjoin the narcotics officers: (1) from testifying in the state trial, and (2) from handing over the illegally seized evidence to state

[1] ... U. S. ..., 76 S. Ct. 292 (1956).

authorities. The District Court denied the motion,[2] and the Court of Appeals affirmed;[3] but on certiorari to the United States Supreme Court, the decision was reversed (5-4).

The Supreme Court *held:* that a federal law enforcement agent who has obtained evidence as a result of an unreasonable search and seizure should be enjoined from introducing such evidence in a state criminal trial and from testifying as to facts disclosed by such illegal search.[4]

NATURE OF THE RELIEF AFFORDED

Speaking for the majority, Mr. Justice Douglas emphasized the fact that the injunctive relief was directed to the wrongdoer himself and not the forum of attempted introduction, stating that, "The command of the federal Rules is in no way affected by anything that happens in a state court."[5] This would appear to be an attempt to minimize

[2] United States District Court for District of New Mexico, unreported decision.

[3] Rea v. United States, 218 F. 2d 237 (10th Cir. 1954).

[4] One writer, in commenting upon this case, has chosen to confine its holding to a much narrower scope. He said:

> ". . . (T)he case should, perhaps, be read to mean that a Federal injunction will issue against the offending Federal officer only where he has been subjected to a *prior Federal suppression order*, that is, where the issue of the federally unconstitutional character of the search and seizure has already been determined in previous proceedings against the defendant in a federal court." Note, *Availability of Federal Injunction to Prevent Federal Officer from Testifying in State Court Concerning Evidence Obtained in the Course of an Unlawful Search*, 44 Ill. Bar J. 639, 642 (1956).

This position appears untenable; inasmuch as the illegality of the search is an essential element of the plaintiff's case in the injunction proceeding, it is unreasonable to assume that prior determination of that issue is necessary. In this case, the prior suppression order served only to establish the fact of illegality at an earlier point of time.

In addition to this, examination of counsels' briefs reveals that the problem, as argued to the Court, was not confined to such narrow interpretation, but was developed generally:

> ". . . (T)he issue is whether the federal rule . . . extends so far as to bar federal officers from testifying in a state prosecution for a state offense even though in so doing they would act merely as witnesses in the state proceeding."

Brief For the United States on Writ of Certiorari, Rea v. United States, p. 11 (1955). See also, Brief For the United States in Opposition On Petition for a Writ of Certiorari, Rea v. United States, (1955), where, at p. 5, the Solicitor General said:

> "As the court below recognized, the net effect sought by petitioner's application is to have the federal courts control and limit the evidence which may be available to a state court for prosecution of a state crime."

Note also the general manner in which the problem was treated in the Brief for the Petitioner on Writ of Certiorari, Rea v. United States, (1955), also not raising the question of prior determination, except as, at p. 34, it makes the point that such prior finding rendered the question of illegality *res judicata*.

[5] *Supra*, n. 1, p. 294.

the true nature of the court's action since it ignores the ever-present considerations brought into play by the supremacy clause of the federal constitution.[6]

What if the state court should subsequently subpoena the enjoined federal officer and demand his appearance? In the answer to this crucial question lies the key to an understanding of the case. If subpoenaed, the officer-witness would be caught between contradictory court processes, one of which would have to be obeyed.

The problem of conflicting federal-state court orders was resolved early in the classic decisions of *Ableman v. Booth* and *United States v. Booth*.[7] After conviction and sentence in a United States district court, a prisoner was released by the Wisconsin Supreme Court on writ of *habeas corpus*. The Supreme Court of the United States settled the issue by writ of error to the Wisconsin court, dismissing the *habeas corpus* and upholding the supremacy of the federal order. Thirteen years later the question was again presented under similar circumstances.[8] The Court affirmed its prior holding, saying:

> "The decision of this court in the two cases which grew out of the arrest of Booth . . . disposes alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal."[9]

The inevitable conclusion to be drawn from the *Rea* case, therefore, is that while the state's attempt to subpoena the officer would not be violative of the Court's mandate as such, it would be necessarily unconstitutional and inoperative under the supremacy clause. Thus it is evident that what the Court has done in this case is to impose upon the state courts a new rule of exclusion, forbidding, upon proper procedure taken (by a federal injunction proceeding), the introduction of evidence obtained by federal officers in an illegal search and seizure.[10]

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[6] U. S. Const. Art. VI, Cl. 2.

[7] 21 How. 506 (U. S. 1859).

[8] Tarble's Case, 13 Wall. 397 (U. S. 1872).

[9] *Ibid*, 403-4. See also Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 353-59 (1930).

[10] This is clearly recognized by Mr. Justice Harlan, who, in his dissent, says, "the injunction will operate quite as effectively, albeit indirectly, to stultify the state prosecution as if it had been issued directly against New Mexico or its officials." *Supra*, n. 1, *dis. op.* 294, 295.

Continuing, Justice Harlan further raised the question of whether other methods of exclusion will be adopted where injunctive relief against federal

THE AREA IN GENERAL

The admissibility of evidence obtained as the product of an unreasonable search and seizure has been the subject of much debate in the American courts and by learned authors since 1886, when, in *Boyd v. United States*,[11] the Supreme Court declared unconstitutional a statute requiring defendant to produce his books and papers in court to be used against him in a federal action to forfeit his property. The invalidity was based partly on the ground that this was, in effect, an unreasonable search and seizure, the Court holding that even Congress cannot authorize the admission of evidence secured through an unreasonable search and seizure in violation of the Fourth Amendment. The common law having declared that the illegal source of evidence in no way affected its admissibility,[12] the new rule constituted a sharp departure from what had previously been accepted without question and raised new problems, primarily: (1) to what agents of procurement the rule would apply, and (2) whether the policy would apply to both the federal and state courts. With the decision of the *Rea* case, it appears that the answers to these two ques-

officers would be too late, terming the situation a race between a federal injunction proceeding and a state trial, and expressing the belief that there would be no further relief given. In the case of testimonial evidence, the time lag between the filing of the complaint and the trial of the case would provide ample opportunity to secure a federal injunction.

But in the case of physical evidence, illegally seized and turned over to State officers before even a temporary restraining order [Fed. Rules Civ. Proc., Rule 65(b), 28 U. S. C. A. (1950 ed.)] could be gotten, or seized in a federal-state joint effort and retained by the state officers, the problem would be difficult. Contrary to the dissent's view, it would appear unlikely that no relief at all would be given. Inaction under those circumstances amounts to putting a premium on greater misconduct by a federal officer, who, in addition to violating search and seizure prohibitions, is crafty enough to evade the express policy of the Rea rule. Although jurisdiction lies in the federal courts to enjoin the states from using such evidence (28 U. S. C. A. (1950 ed.) Sec. 2283), exercise of that jurisdiction appears doubtful in view of the recently accented aversion of federal courts to interfere directly with state judicial proceedings. See Douglas v. Jeanette, 319 U. S. 157, 162 (1943); Darr v. Burford, 339 U. S. 200 (1950); Stefanelli v. Minard, 342 U. S. 117 (1951); Amalgamated Clothing Workers v. Richman Brothers, 348 U. S. 511 (1955). If the policy of the Rea case is to be extended to cover such a situation, it would seem most probable that Supreme Court supervision would be exercised upon certiorari, after the case had run its course, thereby giving the States first opportunity to exclude the evidence where injunction against the Federal officer is too late.

The combined effect of pre-trial suppression where practicable, and at-trial exclusion where not, would be in harmony with the practice regarding suppression of illegally seized evidence in federal criminal proceedings. Fed. Rules Crim. Proc., Rule 41(e), 18 U. S. C. A. (1951 ed.). See Waldron v. United States, *infra*, n. 18, 40 *et seq.*

[11] 116 U. S. 616 (1886).

[12] 8 WIGMORE, EVIDENCE (3rd ed. 1940) Sec. 2183, p. 4 *et seq.*

tions have finally crystallized into a pattern capable of rational understanding.

(a) *In The Federal Courts.* Most illustrative of the rules employed in the federal courts is the case of *Weeks v. United States.*[13] Defendant's home was broken into, and evidence was seized at two different intervals, first by state police independently, and later by state police and a United States marshal. The district court denied a pre-trial motion to suppress and held all the evidence admissible. The Supreme Court reversed, holding that it was error not to suppress the evidence seized in the federal-state officers' joint effort, but that it was not error to admit the evidence seized by the state officers in their independent search, merely affirming the common law rule in regard to the latter.[14]

In the forty-two years that have followed, the *Weeks* holdings have remained substantially unaltered. Evidence illegally seized by federal officers, alone[15] or in collaboration with state officials,[16] is still held inadmissible,[17] and convictions secured by use of the improper evidence are reversed.[18]

As to illegal seizures by state officers, since *Weeks* the Supreme Court has engaged in over four decades of virtual silence.[19] Significant, therefore, is Rule 26 of the Federal Rules of Criminal Procedure[20] which provides that unless modified by Acts of Congress, the rules themselves, or subsequent decisions,[21] the common law principles of evidence are to guide the federal courts. Since the common law

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[13] 232 U. S. 383 (1914).

[14] The Court, seven years later, held that the common law attitude of full admissibility also applied to evidence larcenously seized by private parties. Burdeau v. McDowell, 256 U. S. 465 (1921).

[15] United States v. Jeffers, 342 U. S. 48 (1951).

[16] Byars v. United States, 273 U. S. 28 (1927); Lustig v. United States, 338 U. S. 74 (1949).

[17] See the cases collected in 52 A. L. R. 477, 481; 88 A. L. R. 348, 353; 150 A. L. R. 566, 572. This applies to the introduction of such evidence for impeachment purposes as well as evidence-in-chief. Agnello v. United States, 269 U. S. 20 (1925). But where defendant voluntarily and affirmatively perjures himself on direct examination, in anticipation of the government's inability to introduce the illegally procured evidence, the privilege against introduction is deemed to be waived. Walder v. United States, 347 U. S. 62 (1954).

[18] McDonald v. United States, 335 U. S. 451 (1948). See also Waldron v. United States, 219 F. 2d 37 (D. C. App. 1955).

[19] Although there have been no express holdings on point, see *dicta* in Feldman v. United States, 322 U. S. 487, 492 (1944), and Irvine v. California, quoted, *infra*, n. 23.

[20] 18 U. S. C. A. (1951 ed.).

[21] See 4 BARRON, FEDERAL PRACTICE AND PROCEDURE (1951), 173, Sec. 2150, fn. 17.

admits evidence illegally seized,[22] and since there has been no decision, statute, or rule to the contrary,[23] the lower United States courts have continuously and uniformly held that evidence procured by state officers, even as a result of an illegal search, is properly admissible.[24]

(b) *In The State Courts.* The problem of admissibility *vel non* becomes somewhat more intricate, for purposes of analysis, when the state courts are examined. The chief responsibility over rules of evidence in the state courts rests with the states themselves,[25] the Supreme Court merely imposing upon them minimal standards of compliance. It is not within the scope of this note to discuss the individual state policies,[26] but only the Supreme Court's role in determining what may be admitted and what *must* be excluded.

The leading case on this point is *Wolf v. Colorado.*[27] State police officers had broken into Dr. Wolf's office, arrested him for conspiring to commit abortion, and seized articles on the premises, all without a search warrant.[28] Upon conviction and affirmance by the Supreme Court of Colorado, he brought certiorari. The Court was faced with

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[22] WIGMORE, *loc. cit. supra*, n. 12.

[23] The assumption that the common law rule prevails in these cases is the basis upon which Byars v. United States and Lustig v. United States, *supra*, n. 16, were decided, the latter being on the same day as Wolf v. Colorado, *infra*, n. 27. Gambino v. United States, 275 U. S. 310 (1927), supplies the lone exception to the rule. In the extraordinary case of a State officer acting to enforce a federal law, evidence illegally seized by him is inadmissible in a federal court. It is felt that under such anomalous circumstances he is at least a *de facto* federal officer. United States v. Cotter, 80 F. Supp. 590 (E. D. Va. 1948), and United States v. Irwin, 86 F. Supp. 362 (W. D. Ark. 1949) in accord, general practice being sufficient to establish the fact in the latter. But generally, "Even this Court has not seen fit to exclude illegally seized evidence in federal cases unless a federal officer perpetrated the wrong." — *dictum*, Irvine v. California, 347 U. S. 128, 136 (1954).

[24] WIGMORE, *op. cit. supra*, n. 12, Sec. 2184a, 41. See cases collected in 24 A. L. R. 1408, 1424; 32 A. L. R. 408, 414; 41 A. L. R. 1145, 1150; 52 A. L. R. 477, 485; 88 A. L. R. 348, 362; 134 A. L. R. 819, 827; 150 A. L. R. 566, 576. Recent decisions to this effect are: Jaroshuk v. United States, 201 F. 2d 52 (9th Cir. 1953); Symons v. United States, 178 F. 2d 615 (9th Cir. 1949), *cert. den.*, 339 U. S. 985 (1950); Watson v. United States, 224 F. 2d 910 (5th Cir. 1955); Helton v. United States, 221 F. 2d 338 (5th Cir. 1955); Frierson v. United States, 223 F. 2d 255 (6th Cir. 1955); United States v. White, 228 F. 2d 832 (7th Cir. 1956). See also, Note, *Admissibility In Federal Courts of Evidence Obtained Illegally By State Authorities*, 51 Col. L. Rev. 128 (1951), criticizing the present state of the rule.

[25] Bailey v. Alabama, 219 U. S. 219, 238 (1911).

[26] For Maryland modifications of the common law rule, see Md. Code Supp. (1955) Art. 35, Sec. 5, the so-called Bouse Act. See also Notes, *Admissibility of Evidence Obtained By Unlawful Search and Seizure*, 2 Md. L. Rev. 147 (1938), and *Equal Protection Clause of Fourteenth Amendment No Bar to Territorial Classification Under Bouse Act*, 14 Md. L. Rev. 299 (1954).

[27] 338 U. S. 25 (1949).

[28] Wolf v. People, 117 Colo. 279, 187 P. 2d 926 (1947).

two questions: (1) Was the Fourth Amendment incorporated into the Fourteenth Amendment due process clause, thereby making the seizure by the state officer an illegal one; (2) If so, does the admission of evidence illegally seized by a state officer in a state trial violate the minimal standards imposed by the Supreme Court upon state trials? The Court answered the first in the affirmative and the second in the negative, holding that it is not violative of any federal policy to admit evidence illegally seized by a state officer in a state trial.[29]

With the recent decision of the *Rea* case, therefore, the present policy of the Supreme Court can be stated as favoring exclusion of illegally seized evidence from both federal and state courts if procured by a federal law enforcement officer, and permitting the introduction of evidence similarly obtained by state officers. The true classification, as we have seen, must be on the basis of who obtained the evidence, not where it is sought to be introduced.

RATIONALE

With the above-stated developments in mind, it is proper that we now ask what, if any, theoretical basis can support their permanence.

Turning first to the specific constitutional prohibition, it is obvious that the answer is not to be found there. The Fourth Amendment is the original source of the unreasonable search's illegality, but does it also necessitate the exclusion of the evidence so obtained? Stated differently, is the evidence itself unconstitutional? *Boyd v. United States*[30] ruled yes, disallowing even the right of Congress to authorize its admissibility. If such a view were held today, however, the rules would not be in their present form. The proposition of unconstitutional evidence would have to apply to the Fourteenth Amendment as well, since it has incorporated the Fourth, and the rules of exclusion would necessarily operate upon state officers as well as federal, in both national and local courts. Those who subscribe to this older view are among the dissenters to the

[29] Aff'd in Irvine v. California, *supra*, n. 23, under aggravated circumstances. It should be noted that the first case to give forth with this precise holding was Adams v. New York, 192 U. S. 585 (1904), but its reasoning was so muddled that it was believed to have been emasculated by the Weeks case. Trimble, *Search and Seizure under the Fourth Amendment as Interpreted by the United States Supreme Court*, 41 Ky. L. J. 196, 202 *et seq.* (1952).

[30] 116 U. S. 616 (1886).

Wolf[31] and *Irvine* cases, an example being Mr. Justice Douglas' dissent in the latter:

> "I protest against this use of *unconstitutional* evidence. . . . The Bill of Rights was designed to protect every accused against practices of the police which history showed were oppressive of liberty. The guarantee against unreasonable searches and seizures contained in the Fourth Amendment was one of those safeguards."[32]

Rejecting the inherent unconstitutionality theory, we are left with the more modern interpretation, the expressed belief that exclusion of illegally obtained evidence is primarily a deterrent to the conduct which was its source. In the *Rea*[33] case, the Court applied this view:

> "The only relief asked is against a federal agent, who obtained the property as a result of the abuse of process issued by a United States Commissioner. . . . In this posture we have then a case that raises not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies. . . . A Federal agent has violated the federal Rules governing searches and seizures. . . . The obligation of the federal agent is to obey the Rules. . . . They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceeding."[34]

Why, then, is it the function of the federal judiciary to supervise the activity of federal officers more closely than similar conduct of state affiliates? Mr. Justice Frankfurter's opinion in *Wolf v. Colorado* is most helpful in this regard:

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[31] *Supra*, n. 27, *dis. ops.* 40, 41, 47.

[32] Irvine v. California, *supra*, n. 23, *dis. op.* 149, 151. See also Mr. Justice Rutledge's dissent in the Wolf case, *supra*, n. 27, 47.

[33] ... U. S. ..., 76 S. Ct. 292 (1956). Remembering that the Court spoke through Mr. Justice Douglas in this case, it would appear that he has changed his view since Irvine v. California.

[34] *Ibid*, 294. The quoted material was taken from successive paragraphs. *Cf.*: Murphy, J., dissenting in Wolf v. Colorado, *supra*, n. 27, 44: "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence." While recognizing that deterrence is the basis of the exclusionary rule, the actual value of the rule as a deterrent is severely challenged by Mr. Justice Jackson in the Irvine case, *supra*, n. 23, 135 *et seq.*

> "Granting that in practice, the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. . . . There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."[35]

When the particular malfeasance is on a local level, popular opinion can exert its maximum pressure, and if the public of the locality finds misconduct by its own officers sufficiently objectionable, it is within their effective control to authorize measures aimed at deterrence. But the invasion of a California citizen's privacy by a federal officer is not so likely to inflame a Congressman from Maine, or his constituents, and the public opinion of one area is of diminished importance when a national legislature must be appealed to. Thus, a significant restraint is absent when a federal officer engages in the illegal act, and the Court feels constrained to fill the vacuum.[36]

Moreover, there is an additional factor to be considered, the source of authority for applying these rules as deterrents. Since Congress is explicitly charged with policing

[35] Wolf v. Colorado, *supra*, n. 27, 31 *et seq.*

[36] Where, however, on the state level, the anticipated public restraint is also absent, and the state police misconduct becomes so severe as to be intolerable, the Court will declare due process violated by the introduction of the evidence repulsively obtained. Rochin v. California, 342 U. S. 165, 172 (1952).

> "(W)e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation."

Severity, however, is a matter of degree, and where the line is to be drawn is a problem which must be resolved on an individual basis. Differ-

the requirements of the Fourteenth Amendment,[37] it is the policy of that body which should initially determine the manner in which state misconduct is to be handled. Undoubtedly, an illegal search by a state officer constitutes a federal crime,[38] but it has been held that Congress does not mean to extend its regulations to the point of excluding the evidence disclosed.[39] On the other hand, authority to exclude evidence obtained by a federal officer can be readily found in the doctrine of checks and balances, justifying more careful judicial scrutiny of the activity of a subordinate member of the federal executive branch.[40]

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ences of opinion in such situations undoubtedly arise. In the *Irvine* case, Mr. Justice Frankfurter dissented on the ground that the particular state misconduct was intolerable, in his judgment being worse than a mere unreasonable search and seizure. He said:

> "While there is in the case before us, as there was in *Rochin*, an element of unreasonable search and seizure, what is decisive here, as in *Rochin*, is additional aggravating conduct which the Court finds repulsive."

Irvine v. California, 347 U. S. 128, *dis. op.* 142, 144 (1954).

[37] U. S. Const. Amend. XIV, Sec. 5.

[38] *Cf.* Screws v. United States, 325 U. S. 91 (1945).

[39] Stefanelli v. Minard, 342 U. S. 117, 120 (1951).

[40] "Where powers are separated, each branch has its own powers and prerogatives the exercise of which serves to restrain the other branches, this creating a check-and-balance system. The latter had long been considered a safe-guard against tyranny." FERGUSON & MCHENRY, ELEMENTS OF AMERICAN GOVERNMENT (1st ed. 1950) 52.

"Under separation of powers . . . the executive will restrict its activity to conduct under the law; for an independent judiciary will serve as a check on the executive." GRIFFITH, THE IMPASSE OF DEMOCRACY (1939) 175.