North Dakota Law Review

Volume 39 | Number 3 Article 10

1963

# Unreasonable Searches and Seizures - Constitutional Rights - Retroactive Application of Mapp v. Ohio

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Recommended Citation
McEwen, Neil A. (1963) "Unreasonable Searches and Seizures - Constitutional Rights - Retroactive Application of Mapp v. Ohio," *North Dakota Law Review*: Vol. 39: No. 3, Article 10.
Available at: https://commons.und.edu/ndlr/vol39/iss3/10

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It is submitted that when a municipality takes out insurance, the premiums are calculated in accordance to the amount of loss the municipality may incur, taking into account the size of the municipality, the number of functions it engages in, and the fact that the municipality will be immune from most suits by acting in its governmental capacity. To allow recovery on all torts, based on the mere fact that the governmental unit has taken out liability insurance, can have no other effect than to raise the cost of premiums considerably. Such a result would in turn defeat the purpose of governmental immunity by indirectly applying public funds toward payment of a greater number of damage claims.

Under the circumstances shown, it is not necessarily a waste or misuse of public funds to procure insurance while retaining governmental immunity.

R. GORDON NESVIG

UNREASONABLE SEARCHES AND SEIZURES—CONSTITUTIONAL RIGHTS — RETROACTIVE APPLICATION OF MAPP V. OHIO—Plaintiff's hotel room was searched by state officers without a warrant or the plaintiff's consent. Evidence obtained in the illegal search was used against the plaintiff to convict him of murder. The plaintiff made no objection regarding the admissibility of the evidence in court. In reliance on *Mapp v. Ohio*,[1] the accused appealed by federal habeas corpus.[2] The United States Court of Appeals, Fourth Circuit, *held*, two judges dissenting, that the United States Supreme Court opinion declaring evidence obtained by state officers from an illegal search and seizure applies retroactively and prisoner's failure to object to evidence so obtained was excusable and did not result in a forfeit of his constitutional rights. *Hall v. Warden, Maryland Penitentiary*, 313 F.2d 483 (4th Cir. 1963).

The Supreme Court has long held that the use of illegally obtained evidence is unconstitutional and cannot be admitted

1. 367 U.S. 643 (1961).
2. Title 28 U.S.C. § 2254 (1958).

in any federal court.[3] In 1949, *Wolf v. Colorado*[4] declared that the constitutional privacy guarantee extended to the states, but did not impose on the states the same exclusionary rule of evidence by which the federal courts are bound. *Mapp v. Ohio*[5] overruled this decision and put the admissibility of evidence on a strict constitutional ground,[6] excluding the introduction in state courts of evidence obtained by illegal search and seizure.

This state exclusionary rule has presented the problem, should it be applied retroactively? Strict constitutional interpretations that have not been expressly restricted to prospective application have generally been given retroactive effect.[7] Prospective application is usually the total scope of a new statute; a similar construction being given to decisions which, if applied retroactively, would cause hardship.[9]

The apparent retroactive effect given to *Griffin v. Illinois*,[10] has not been appllied to *Mapp v. Ohio*; although both decisions rested on a violation of due process. The majority of the courts have refused to allow retroactive review because no objection to the illegally obtained evidence was made in the trial court.[11] Most courts that have allowed review have given *Mapp* a prospective interpretation only.[12] These courts have based their decisions on the wording of the *Mapp*

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3. Weeks v. United States, 232 U.S. 383 (1914).

4. 338 U.S. 25 (1949).

5. 367 U.S. 643 (1961).

6. **Id.**, at 660. Mr. Justice Clark summed up the court's stand: "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. . . . Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him. . . ."

7. See Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958). The Supreme Court herein held that a 1935 conviction which denied the indigent appellant a free transcript violated his constitutional right as was declared by Griffin v. Illinois, 351 U.S. 12 (1956). See generally Stimson, **Retroactive application of Law—A Problem in Constitutional Law,** 38 Mich. L. Rev. 30 (1939).

8. Bruner v. United States, 343 U.S. 112 (1952); Claridge Apartments Co. v. Comm'r., 323 U.S. 141 (1944).

9. Gt. No. Ry. v. Sunburst Co., 287 U.S. 358 (1932); Safarik v. Udall, 304 F.2d 944 (D.C. Cir. 1962).

10. **Supra** note 7.

11. United States **ex. rel.** Gregory v. People of State of N.Y., 195 F. Supp. 527 (D.C. N.Y. 1961); Moore v. State, 146 So. 2d 734 (Ala. 1962); Shorey v. State, 227 Md. 385, 177 A.2d 245 (1962).

12. **E.g.** People v. Figueroa, 220 N.Y.S.2d 131 (County Ct. 1961).

case.[13] Another reason is that those previously brought to trial were convicted on the authority of case law then in effect.[14] Retroactive application has extended only to those cases pending appeal when the Mapp decision was rendered.[15]

The Supreme Court, aware of the retroactive effect given to its prior decisions, failed to expressly limit the newly enunciated constitutional right to the future. In such light and based on the constitutional question involved, at least one other case has declared that *Mapp v. Ohio* applies retroactively.[16] The failure to object to the admissibility of evidence should not be a waiver of the constitutional right, for under these circumstances, justice requires a departure from the ordinary waiver rule.[17]

North Dakota has held according to the nonexclusionary rule regarding admissibility of illegally obtained evidence.[18] They must now adopt the exclusionary rule set out in *Mapp v. Ohio*. Pertaining to the question of retroactive application it is submitted that the decision of the court in the instant case is the proper interpretation.

NEIL A. MCEWEN

INSURANCE — EXTENT OF LOSS AND LIABILITY OF INSURER— DEFENSE OF ACTIONS — Defendant insurance company issued an automobile liability policy to insured and certified that the policy complied with provisions of the financial responsibility law. Subsequently plaintiff sustained losses caused by insured's negligence, and following unsuccessful negotiations with defendant, instituted proceedings against insured. Insured failed to notify defendant of the impending suit as required by the policy; subsequently plaintiff recovered a default judgment. Upon defendant's refusal to satisfy

13. **E.g.** State v. Long, 71 N.J. Super. 583, 177 A.2d 609 (1962).

14. Commonwealth v. Mancini, 198 Pa. Super. 642, 184 A.2d 279 (1962).

15. **E.g.** People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478 (1961).

16. Hurst v. People of State of Cal., 211 F. Supp. 387 (N.D. Cal. 1962): See Norton v. Shelby County, 118 U.S. 425 (1886) wherein Mr. Justice Field expressed an analogous theory: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

17. See, Sunal v. Large, 332 U.S. 174 (1947); See generally, Broeder, **The Decline and Fall of Wolf v. Colorado,** 41 Neb. L. Rev. 185, 209 (1961).

18. State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925).