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Constitutional Law - Searches and Seizures - Enjoining Testimony of Federal Officer in State Prosecution

Robert L. Eckert

attorney is the prosecution of all criminal cases within his county.[11] It has been clearly held that a states attorney can nol. pros. only with the consent of the court, and that the court's discretion in this regard will not be reviewed by mandamus.[12] In the instant case the state's attorney had been unsuccessful in an attempt to nol. pros. He then requested the Attorney General to etner the case and move to nol. pros. the indictment.

A West Virginia case, *Denham v. Robinson*,[13] faced with an identical situation denied the power of the prosecuting attorney and the Attorney General to nol. pros. without the consent of the court holding that where the Attorney General undertakes to exercise or control powers and duties of the prosecuting attorneys, he is limited by the same rules of practice that control them. It is submitted that the latter case forms the more logical rule. The states attorney, who can nol. pros. only with consent of the trial court, should not be allowed to do indirectly, that which he cannot do directly.

CECIL E. REINKE.

CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — ENJOINING TESTIMONY OF FEDERAL OFFICER IN STATE PROSECUTION. — Plaintiff sued in a federal district court to enjoin a federal narcotics agent from testifying against him in a state prosecution for violation of its narcotics law as to evidence determined in a prior federal criminal prosecution to have been illegally obtained. The former prosecution had been dismissed on motion of the government because of the inadmissability of the evidence. The Court of Appeals affirmed the denial by the lower court of the relief sought. On certiorari the Supreme Court, with four judges dissenting, reversed the ruling of the Court of Appeals and *held* that the agent was subject to injunction. *Rea v. United States*, 350 U. S. 214 (1956).

Since *Weeks v. United States*[1] federal courts have denied admission to illegally obtained evidence.[2] Prior to that case it was admissable.[3] This prohibition, however, does not bar all illegally obtained evidence. If the evidence was not obtained by federal officers, but by strangers[4] or state officers,[5] it may be admitted. Where it was obtained by federal officers through an illegal search and seizure of a third person's property it may also be admitted.[6] The objection to the evidence must be made promptly upon discovery of the fact that it was obtained by illegal means, or else the right to object is deemed to

11. Ill. Ann Stat. c. 14 § 5 (1951). "The duty of each state's attorney shall be to commence and prosecute all . . . indictments . . . in any court of record in his county in which the people of the state or county may be concerned."
12. People *ex rel.* Hoyne v. Newcomer, 284 Ill. 315, 120 N.E. 244 (1918).
13. 72 W. Va. 243, 77 S.E. 970 (1913).

1. 232 U. S. 383 (1914).
2. See Amos v. United States, 255 U. S. 313 (1921); Gouled v. United States, 255 U. S. 298 (1921); Silverthrone Lumber Co. v. United States, 251 U. S. 385 (1920).
3. Adams v. New York, 192 U. S. 585 (1904); Hardesty v. United States, 164 Fed. 420 (6th Cir. 1908).
4. Burdeau v. McDowell, 256 U. S. 465 (1920); see Pederson v. United States, 271 Fed. 187 (2d Cir. 1921).
5. Weeks v. United States, 232 U. S. 383 (1914); Rice v. United States, 251 Fed. 778 (1st Cir. 1918); United States v. O'Dowd, 273 Fed. 600 (N. D. Ohio 1921); United States v. Burnside, 273 Fed. 603 (W. D. Wis. 1921).
6. Anderson v. United States, 273 Fed. 20 (8th Cir. 1921); Haywood v. United States, 268 Fed. 795 (7th Cir. 1920), *cert. denied*, 256 U. S. 689 (1921); Tsuie Shee v. Backus, 243 Fed. 551 (9th Cir. 1917).

have been waived.[7] Although there is a split of authority in regard to admissability in state courts, the majority admit illegally obtained evidence.[8] This rule is followed in New Mexico[9] and North Dakota.[10]

The theory that provided the basis for the decision in the instant case was that the federal courts have a supervisory power over federal law enforcement agencies, and it is their duty to police the requirements of the Federal Rules of Criminal Procedure and enforce its observance.[11] While the majority cite for authority the case of *McNabb v. United States*,[12] it is difficult to see how that case can logically be precedent for this decision. The Supreme Court in that case specifically stated that it was not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement.[13]

The majority also rely upon the case of *Wise v. Henkel*.[14] In that case the Supreme Court held that if goods had been illegally obtained by prosecuting officers the court has inherent power to order the return of those goods.[15] If the court, in the instant case, had limited its order to the prohibition of the use of the goods obtained *Wise v. Henkel* would have provided good authority. A federal statute specifically provides that all property taken under any revenue law of the United States shall be contraband subject to the orders and decrees of the federal courts.[16] The decision in the instant case appears to be justifiable only as an extension of the holding of *Wise v. Henkel*.

One problem raised by the decision of the instant case involved that of separation of powers, since here the judiciary in effect has regulated the action of an employee of the executive branch of the government. This is the first time, according to dissenting Justice Harlan, that the Supreme Court has declared that the federal courts share with the executive branch of the government responsibility for supervising law enforcement activities as such.[17] Another interesting problem presented by this case is the conflict between the state and federal authority. Although the majority decision states that by issuing the requested injunction the District Court would not interfere with state agencies in enforcement of the law,[18] such a claim is of doubtful logic because the effect of the order is to completely destroy the cause of action in

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7. United States v. Sferas, 210 F.2d 69 (7th Cir. 1954); Rose v. United States, 149 F.2d 755 (9th Cir. 1945); United States v. Wernecke, 138 F.2d 561 (7th Cir. 1943).

8. See Wolf v. Colorado, 338 U. S. 25 (1948); McCormick, Evidence, 291 (1954).

9. State v. Bell, 35 N. M. 96, 290 Pac. 739 (1930); State v. Watts, 35 N. M. 94, 290 Pac. 738 (1930); State v. Dillon, 34 N. M. 366, 281 Pac. 474 (1929).

10. State v. Lacy, 55 N. D. 83, 212 N.W. 442 (1927); State v. Fahn, 53 N. D. 203, 205 N.W. 67 (1925).

11. See Rea v. United States, 350 U.S. 214, 216, 217 (1956) ("[W]e have a case that raises . . . a question . . . concerning our supervisory powers over federal law enforcement agencies . . . The power of the federal courts extends to policing those requirements and making certain that they are observed.")

12. 318 U. S. 332 (1943).

13. *Id.* at 347. ("[W]e confine ourselves to our limited function as the court of ultimate review of the standards, formulated and applied by federal courts in the trial of criminal cases. We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement.")

14. 220 U. S. 556 (1911).

15. *Id.* at 558. ("[I]t was within the power of the court to take jurisdiction of the subject of the return, and pass upon it, as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court.")

16. 62 Stat. 974 (1948), 28 U. S. C. § 2463 (1952).

17. See Rea v. United States, 350 U. S. 214, 218 (1956).

18. *Id.* at 216. ("The District Court is not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law.")

the state court. The Supreme Court said in *Stefanelli v. Minard*[19] that it would not interfere in state criminal proceedings to suppress evidence illegally obtained because of the special delicacy of the adjustment to be preserved between federal equitable power and state adminstration of its own law.[20]

Another argument against the decision laid down in this case is that it places additional restraints on federal law enforcement officials, thus making the apprehension of criminals more difficult. It has been argued that, as in the instant case, it would have the effect of releasing upon society criminals that are known to be guilty.[21]

Despite the rather weak authority for the decision reached in this case, it is submitted that the results flowing from the decision should be beneficial. Some feel that existing law does not provide sufficient protection from the arbitrary and illegal acts of law enforcement officers.[22] On the state level, suits against a policeman are generally fruitless because of his financial condition, and the municipality that hired the policeman is not liable because of governmental immunity.[23]

ROBERT L. ECKERT.

CONTRACTS — SPECIFIC PERFORMANCE — INTOXICATION AS A DEFENSE. — In an action for specific performance of a contract for a sale of land brought by the vendee against the administratrix of the deceased vendor, the defense of intoxication of the vendor at the time of the execution of the contract was asserted. The District Court entered judgment for the plaintiff vendee and denied defendant's motion for trial de novo. On appeal, the Supreme Court of North Dakota *held* that the judgment of the lower court was correct in denying the defense of intoxication on the basis of the evidence presented. *Christianson v. Larson*, 77 N.W.2d 441 (N. D. 1956).

The early common law theory which provided that intoxication was no defense to the validity of a contract[1] has undergone a transformation so that today most states hold that a contract entered into by a party "excessively" intoxicated is voidable as to him.[2] What is meant by "excessive" intoxication has apparently not been precisely defined, but the common conception is that the intoxication must be so great as to deprive one of reason and understanding, thus rendering him incapable of comprehending the nature and consequences of his act.[3] This excessive intoxication to be effective as a defense must occur at the time the contract was executed.[4] The time within which excessive

19. 342 U. S. 117 (1951).
20. *Id.* at 120.
21. Comment, 42 Mich. L. Rev. 910 (1944) (Such decisions tend to "handicap law enforcement . . . and are . . . contrary to the public interest . . .")
22. Orfield, Criminal Procedure From Arrest to Appeal, 28-31 (1947).
23. *Id.* at 28, 29.

1. 2 Kent Comm. 451 (10th ed. 1860); Buch v. Breinig, 113 Pa. 310, 6 Atl. 86 (1886) (dictum).
2. *E.g.* Hauge v. Bye, 51 N.D. 848, 201 N.W. 159 (1924); Spoonheim v. Spoonheim, 14 N. D. 380, 104 N.W. 845 (1905); *In re* Thorne's Estate, 344 Pa. 503, 25 A.2d 811 (1942); *Ex parte* Burns, 194 Wash. 293, 77 P.2d 1025 (1938).
3. Martin v. Harsh, 231 Ill. 384, 83 N.E. 614 (1907); Keedick v. Brogan, 116 Neb. 339, 217 N.W. 583 (1928); Renfeldt v. Brush-McWilliams Co., 45 N. D. 224, 176 N.W. 838 (1919); Harlow v. Kingston, 169 Wis. 521, 173 N.W. 308 (1919).
4. Emerson v. Shirley, 188 La. 196, 175 So. 909 (1937); Simpson, Contracts 293 (1954).