Michigan Law Review

Volume 37 | Issue 7

1939

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SEARCHES AND SEIZURES — EFFECT OF COERCION — WAIVER OF CONSTITUTIONAL PRIVILEGE BY WIFE IN HUSBAND'S ABSENCE — The defendant and his son were shot as prowlers while they were taking a "short-cut" through the informant's barnyard. They managed to reach home, where after a physician's treatment they were placed under arrest and taken to jail on a charge of stealing the informant's chickens. Later some of the arresting officers returned to the defendant's home without a search warrant. Whether or not the wife's consent was secured is disputed, but a search was made of the defendant's henhouse, and thirty-one chickens were seized as stolen property. Before the commencement of the trial, a motion filed by the defendant to suppress the evidence obtained by the search was denied. *Held*, denial of the motion was error, for even assuming that consent of the defendant's wife was obtained, the circumstances were so tinged with official coercion that the wife could not waive her husband's constitutional right to be free from unreasonable searches and seizures. *People v. Lind*, 370 Ill. 131, 18 N. E. (2d) 189 (1938).

About one-half the states, including Illinois, follow the so-called "federal" rule of excluding evidence obtained by an unreasonable search and seizure,[1] although neither the Federal Constitution nor the respective state constitutions deal with the question of the admissibility of such evidence.[2] In those jurisdictions, it is universally agreed that a search without a warrant is reasonable if conducted with the consent of one qualified to waive the constitutional guaranty. It is equally clear, however, that the consent must be freely given, without express or implied coercion.[3] Thus it has been held that a show of arms,[4] the use of threats,[5] confrontation with a search warrant,[6] mere peaceful submission,[7] or even silent acquiescence,[8] preclude the idea of a voluntary waiver. Because the court in the principal case based its decision upon the effect of coercive factors,[9]

[1] For a discussion of the merits of the rule, see Waite, "Reasonable Search and Research," 86 UNIV. PA. L. REV. 623 (1938); 4 WIGMORE, EVIDENCE, 2d ed., §§2183-2184 (1923); CORNELIUS, THE LAW OF SEARCH AND SEIZURE, 45 et seq. (1926); Broadhurst, "Use of Evidence Obtained by Illegal Search and Seizure," 24 KY. L. J. 191 (1936); Harno, "Evidence Obtained by Illegal Search and Seizure," 19 ILL. L. REV. 303 (1925). Cases are collected in 24 A. L. R. 1408 (1923); 32 A. L. R. 408 (1924); 41 A. L. R. 1145 (1926); and 52 A. L. R. 477 (1928).

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U. S. Const., Fourth Amendment. The same provision is contained in the Illinois Constitution, art. 2, § 6.

[3] 56 C. J. 1178 (1932); 27 A. L. R. 720 (1923); 39 A. L. R. 822 (1925).

[4] United States v. Marquette, (D. C. Cal. 1920) 271 F. 120.

[5] Wiggins v. State, 28 Wyo. 480, 206 P. 373 (1922).

[6] Meno v. State, 197 Ind. 16, 148 N. E. 420 (1925).

[7] United States v. Rembert, (D. C. Tex. 1922) 284 F. 996.

[8] State v. Owens, 302 Mo. 348, 259 S. W. 100 (1924).

[9] This, too, was the basis of the decision in the oft-misquoted (note 12, infra) and misinterpreted case of Amos v. United States, 255 U. S. 313, 41 S. Ct. 266 (1921), where the court said, "We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected." The facts of the Amos case as reported are sketchy, but as pointed out in a later decision [Cass v. State, 124 Tex. Crim. 208, 61 S. W. (2d) 500 (1933)] the

the statement that a wife cannot waive her husband's constitutional privilege in his absence is mere dictum. The cases are nearly unanimous in holding that a third person other than a wife cannot give binding consent without an express agency or co-ownership of the searched premises.[10] Most of the text writers include the wife as well, on the ground that the privilege is strictly personal and is subject to waiver only by the person whose rights are invaded.[11] A survey of the cases, however, shows a striking want of direct and convincing authority.[12] A majority of the few decisions in point indicate that in the absence of coercion a wife may waive her husband's constitutional rights.[13] The authorities seldom distinguish the problem as it arises in trespass actions [14] and in criminal cases. It may well

officers threatened that if the wife refused to let them carry out the purposes for which they came, they would search nevertheless. Yet the Amos case has been widely construed as holding that a coercive situation is implied from the mere presence of officers. Duncan v. Commonwealth, 198 Ky. 841, 250 S. W. 101 (1923); Potowick v. Commonwealth, 198 Ky. 843, 250 S. W. 102 (1923); Veal v. Commonwealth, 199 Ky. 634, 251 S. W. 648 (1923); Meredith v. Commonwealth, 215 Ky. 705, 286 S. W. 1043 (1926); Byrd v. State, 161 Tenn. 306, 30 S. W. (2d) 273 (1930); State v. Bonolo, 39 Wyo. 299, 270 P. 1065 (1928). Obviously in these jurisdictions the pure question of the wife's right to waive her husband's privilege will never arise, because there will always be "implied coercion."

[10] 58 A. L. R. 737 (1929); Shumaker, "Consent of Another as Legalizing Search and Seizure," 32 LAW NOTES 169 (1928).

[11] 56 C. J. 1182 (1932); UNDERHILL, CRIMINAL EVIDENCE, 4th ed., § 800 (1935); CORNELIUS, THE LAW OF SEARCH AND SEIZURE, § 25 (1926). Contra: 24 R. C. L. 723 (1919).

[12] This is particularly true when the actual basis of some of the decisions is considered. For example, in Carignano v. State, 31 Okla. Cr. 228, 238 P. 507 (1925), the court relied on Amos v. United States, 255 U. S. 313, 41 S. Ct. 266 (1921), basing its decision upon the presence of implied coercion. The reporter promptly misread the quotation from the Amos case and wrote a misleading headnote. Shortly thereafter, in Rose v. State, 36 Okla. Cr. 333, 254 P. 509 (1927), the same court based its decision on the Carignano case, citing the headnote as the court's holding. The Illinois court in the principal case made the same error in citing the Carignano case. Likewise, in the line of Kentucky cases (cited note 9, supra) the headnotes inaccurately summarized the court's decisions until eventually in Gilliland v. Commonwealth, 224 Ky. 453, 6 S. W. (2d) 467 (1928), the court, by way of dictum, declared itself as holding that the wife has no right to consent for her husband, which is the exact rule that the cited cases expressly avoided.

[13] Pruitt v. State, 109 Tex. Cr. 71, 2 S. W. (2d) 856 (1928); Traylor v. State, 111 Tex. Cr. 58, 11 S. W. (2d) 318 (1928); Alejandro v. State, 116 Tex. Cr. 325, 31 S. W. (2d) 456 (1930); Cass v. State, 124 Tex. Cr. 208, 61 S. W. (2d) 500 (1933); Ellis v. State, 130 Tex. Cr. 220, 93 S. W. (2d) 438 (1936). Contra are United States v. Rykowski, (D. C. Ohio 1920) 267 F. 866, and Fitter v. United States, (C. C. A. 2d, 1919) 258 F. 567, though in the latter case no reason was given. While it has been argued that the Texas cases rest solely upon the interpretation of the Married Women's Act [11 N. Y. UNIV. L. Q. REV. 466 (1934)], it would seem from the decisions that in fact the statute was used only as one of the justifications for the holding.

[14] Grim v. Robison, 31 Neb. 540, 48 N. W. 388 (1891); Smith v. McDuffee, 72 Ore. 276, 142 P. 558, 143 P. 929 (1914); Humes v. Taber, 1 R. I. 464 (1850).

be that a husband whose privacy has been invaded can recover in a trespass action, if he shows that damages to his personal or business interests actually resulted, even though his unsuspecting wife has consented to the intrusion. In a criminal action, however, evidence is the only thing sought, and in such cases the purpose of the constitutional provisions is not to furnish a "bombproof dugout" for criminals,[15] but rather to foster the social desirability of protecting the privacy of the home from obnoxious or disgraceful disturbances of domestic peace. It is just such protection that a wife intends to waive and should be able to waive.

[15] Massantonio v. People, 77 Colo. 392, 236 P. 1019 (1925).