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SEARCH AND SEIZURE - BURDEN OF PROVING ILLEGALITY OF SEARCH FOR PURPOSE OF SUPPRESSING EVIDENCE

SEARCH AND SEIZURE — BURDEN OF PROVING ILLEGALITY OF SEARCH FOR PURPOSE OF SUPPRESSING EVIDENCE — Defendant was charged with unlawful possession of five mink skins during the closed season. His motion made before trial to suppress the evidence because of unlawful seizure was denied. He was convicted, and now appeals assigning the refusal to suppress the evidence as error. *Held,* judgment affirmed. The court said, "Upon a motion to suppress evidence because of an unlawful seizure, the burden of establishing that his rights have been transgressed is upon the party asserting such transgression." *State v. Drew,* 217 Wis. 216, 257 N. W. 681 (1934).

As the court in the instant case points out,[1] the illegality incident to securing the evidence has nothing to do with its probative value. The rule that such illegality makes the evidence inadmissible is laid down in this [2] and other jurisdictions [3] only in the hope of discouraging over-zealous policemen from extra-legal methods. It has been justly criticized,[4] and many jurisdictions refuse to follow it.[5]

[1] State v. Drew, (Wis. 1934) 257 N. W. 681 at 683.

[2] Glodowski v. State, 196 Wis. 265, 220 N. W. 227 (1928).

[3] Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, L. R. A. 1915B 834, Ann. Cas. 1915C 1177 (1914); Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261 (1921); Batts v. State, 194 Ind. 609, 144 N. E. 23 (1924); People v. Reid, 315 Ill. 597, 146 N. E. 504 (1925); Adkins v. Commonwealth, 202 Ky. 86, 259 S. W. 32 (1924); People v. Alverson, 226 Mich. 342, 197 N. W. 538 (1924); Tucker v. State, 128 Miss. 211, 90 So. 845, 24 A. L. R. 1377 (1922); State v. Wills, 91 W. Va. 659, 114 S. E. 261, 24 A. L. R. 1398 (1922).

[4] 4 WIGMORE, EVIDENCE, 2d ed., 632 (1923); Harno, "Evidence Obtained by Illegal Search and Seizure," 19 ILL. L. REV. 303 (1925); and see an opinion written by Cardozo, People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926).

[5] Banks v. State, 207 Ala. 179, 93 So. 293, 24 A. L. R. 1359 (1921); State v. Reynolds, 101 Conn. 224, 125 A. 636 (1924); State v. Rowley, 197 Iowa 977, 195

Being committed to the rule, the Supreme Court of Wisconsin in this case restricts its operation by placing upon the accused the burden of showing the illegality of the search. This result follows naturally from established principles of evidence. It would be difficult to find a better example of a burden of proof, defined by Professor Wigmore as "the risk of non-persuasion" [6]— if defendant does not persuade the court to suppress the evidence, it will not act. But this simple and sensible analysis is not made in this case, or any other which the writer has found. None of the cases on the point, whether they agree with this case [7] or place the burden upon the state,[8] seem to show much concern about the reason for the ruling made. There is nothing in the instant case except a suggestion that the burden upon the defendant is an incident of the presumption that public officers will act legally. This seems to be the position of most courts,[9] but Professor Wigmore has clearly shown it to be erroneous [10]— a presumption disappears when there is evidence to rebut it. However, it may be arguing in a vacuum to criticize the application of rules of evidence, developed for the guidance of a jury, to a preliminary question decided by the court.[11] It would be difficult to imagine a situation in which the trial court's attitude as to burden of proof on a preliminary question [12] could become significant upon review. Since the trial court presumably gave himself no instructions, the only suggestion to the appellate court of his

N. W. 881 (1923); State v. Weaver, 157 La. 95, 102 So. 81 (1924); Commonwealth v. Donnelly, 246 Mass. 507, 141 N. E. 500 (1923); Billings v. State, 109 Neb. 596, 191 N. W. 721 (1923); State v. Lyons, 99 N. J. L. 301, 122 A. 758 (1923); State v. Aime, 62 Utah 476, 220 P. 704, 32 A. L. R. 375 (1923).

[6] 5 WIGMORE, EVIDENCE, 2d ed., 437 (1923).

[7] State ex rel. Brown v. District Court, 72 Mont. 213, 232 P. 201 (1925); Reutlinger v. State, 43 Okla. Cr. 261, 277 P. 950 (1929); Hunter v. State, 111 Tex. Cr. 252, 12 S. W. (2d) 566 (1929); Samson v. United States, (C. C. A. 1st, 1928) 26 F. (2d) 769.

[8] Meno v. State, 197 Ind. 16, 148 N. E. 420, 164 N. E. 93 (1925); Cuevas v. City of Gulfport, 134 Miss. 644, 99 So. 503 (1924); State v. Kelly, 38 Wyo. 455, 268 P. 571 (1928); Kovach v. United States, (C. C. A. 6th, 1931) 53 F. (2d) 639. Also see Taylor v. State, 120 Tex. Cr. 268, 49 S. W. (2d) 459 (1932), and Combs v. Commonwealth, 242 Ky. 793, 47 S. W. (2d) 725 (1932), which hold that the prosecution must produce the search warrant under which the evidence was obtained, but then the "burden is shifted" to the defendant.

[9] The clearest statement of this view is found in Stewart v. State, 52 Okla. Cr. 298, 5 P. (2d) 173 (1931).

[10] 5 WIGMORE, EVIDENCE, 2d ed., § 2491 (1923). A good example of the true presumption situation is found in Davis v. State, 203 Ind. 443, 180 N. E. 595 (1932), where it was held that a motion to suppress evidence was properly denied since neither the state nor the accused presented evidence. In the instant case there was some evidence (an affidavit) introduced.

[11] "So too, in all interlocutory proceedings, even when responsory and not 'ex parte,' the usual system of rules is ignored, again partly because of the subsidiary and provisional nature of the inquiry, but chiefly because there is no jury, and the rules of Evidence are, as rules, traditionally associated with a trial by jury." 1 WIGMORE, EVIDENCE, 2d ed., 20 (1923).

[12] All that is said here applies, of course, only where the court decides the preliminary question, and not where the jury decides it.

error would be a decision markedly contrary to the weight of the evidence. In that case, the proper ground for reversal would be that the finding of the court was contrary to the evidence, or that there was an abuse of discretion. So it would seem that statements by the appellate court about the burden of proof are nothing but a loose justification of their ruling in affirming or reversing the lower court's decision.[13]

C. P. H.

[13] That the question of burden of proof was not the real issue in the instant case is shown by the language of the court (257 N. W. 681 at 683): "Upon the motion to suppress, the record was left in such a condition that the trial court was not warranted in deciding that what was done in the matter of securing the evidence was not done by virtue either of a valid search warrant or that the evidence was obtained by some other lawful means."