Michigan Law Review

Volume 64 | Issue 1

1965

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Defendant's wife and a private detective rented units on either side of defendant's motel room, placed an electronic listening device between one of the units and defendant's room, and entered defendant's room with a key obtained by bribing the chambermaid. Photographs were taken, and clothing and bedding were seized; this evidence was delivered to the prosecutor, who brought a criminal action for adultery. The Circuit Court for Calhoun County, Michigan, *held* that evidence obtained by private persons through an entry and taking which are criminal under state law must be excluded from a subsequent criminal prosecution.[1] Exclusion was considered necessary, on non-constitutional grounds, to preserve the integrity of the law-enforcement process and to prevent collusive agreements between the police and private persons.

At common law, illegally seized evidence was admissible on the theory that the nature of the seizure did not necessarily affect the probative value of the evidence.[2] However, in 1914 the United States Supreme Court, in order to protect the fourth amendment's guarantee of freedom from unreasonable searches and seizures, adopted a rule excluding from federal courts evidence illegally seized by federal officials.[3] In 1961, the scope of this rule was extended by *Mapp v. Ohio*,[4] which held that all evidence obtained in violation of the fourth amendment is inadmissible in state courts. However, the *Mapp* doctrine applies only to "*official* lawlessness,"[5] not to unlawful private seizures. Since *Burdeau v. McDowell*,[6] in which the Supreme Court held that the Constitution does not forbid the admission in evidence in a criminal trial of papers illegally seized by private persons, state and federal courts have refused to exclude evidence in criminal prosecutions unless there was some official involvement in the unlawful search and seizure.[7] However, the Michigan Supreme

* Finding, Doc. No. 21-225, Calhoun County Cir. Ct. Mich., Feb. 24, 1965 (hereinafter cited as principal case).

1. The court found that there had been an illegal entry without permission, that the taking of the key by the chambermaid was larceny, and that removal of the evidence constituted larceny from a building under MICH. COMP. LAWS §§ 750.115, .356, .360 (1948).

2. See, *e.g.*, State v. Reynolds, 101 Conn. 224, 125 Atl. 636 (1924); Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841); People v. Defore, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926). See generally MCCORMICK, EVIDENCE § 137 (1954); 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. ed. 1961).

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

4. 367 U.S. 643 (1961).

5. *Id.* at 655. (Emphasis added.)

6. 256 U.S. 465 (1921).

7. *E.g.*, United States v. Goldberg, 330 F.2d 30 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964); Knoll Associates, Inc. v. Dixon, 232 F. Supp. 283 (S.D.N.Y. 1964); People v.

Court has not been strictly insistent upon finding official involvement as a prerequisite for excluding evidence considered offensive. In a 1958 civil wrongful death action, the court held that a blood sample taken by a private nurse without the defendant's consent was inadmissible because the "taking" violated the right to privacy granted by a Michigan constitutional provision similar to the fourth amendment.[8] Although the fourth amendment to the federal constitution is now applicable to the states through the due process clause of the fourteenth amendment,[9] under *Burdeau* there is no constitutional violation unless a governmental agency is involved in the illegal search and seizure.

Within accepted definitions of "state action,"[10] there would seem to be no official involvement in the principal case sufficient to render the evidence constitutionally inadmissible under *Mapp*. The conduct of the detective would not become state action until he asserted official authority, which was not done in the principal case.[11] Similarly, use of the illegally seized evidence by the prosecutor would not constitute a ratification under ordinary agency principles unless the detective had purported to act for the state during the illegal seizure.[12] Furthermore, mere receipt of evidence by the trial court would seem to fall outside the scope of the state-action

Johnson, 153 Cal. App. 2d 870, 315 P.2d 468 (Dist. Ct. App. 1957); Gilliam v. Commonwealth, 263 Ky. 342, 92 S.W.2d 346 (1936).

8. Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958). Michigan is apparently the only state in which such evidence would be excluded in a civil action. See text accompanying note 33 *infra*. See also People v. Corder, 244 Mich. 274, 221 N.W. 309 (1928), holding that testimony by a private physician as to an examination made without the defendant's consent is inadmissible as being in violation of Michigan constitutional provisions against self-incrimination.

9. See Mapp v. Ohio, 367 U.S. 643, 655 (1961), where the court interpreted Wolf v. Colorado, 338 U.S. 25 (1949), as having applied the fourth amendment to the states through the due process clause. For a discussion as to whether *Wolf* actually did extend the fourth amendment *in toto* to the states, see Kamisar, *Wolf and Lustig Ten Years Later—Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1101-08 (1959). See also Ker v. California, 374 U.S. 23, 33 (1963), holding that the fourth amendment's standard of the reasonableness of a search is applicable to the states through the fourteenth amendment.

10. See generally Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

11. See Williams v. United States, 341 U.S. 97, 100 (1951). Although the court in the principal case mentioned that a private detective is issued a metal badge by the state, principal case at 14, there is no evidence that the badge was used by the detective to gain admission, to obtain the key, or for any other purpose. According to the court, the detective has a "special status" derived in part from the fact that he is licensed under Michigan law. Principal case at 15. See MICH. COMP. LAWS § 338.801 (1948). Some members of the United States Supreme Court, particularly Mr. Justice Douglas, have urged extension of the state-action doctrine to state-licensed facilities. See, *e.g.*, Lombard v. Louisiana, 373 U.S. 267, 282 (1963) (concurring opinion); Garner v. Louisiana, 368 U.S. 157, 184 (1961) (concurring opinion). This argument has not yet been accepted by the full Court, however, and has been advocated only in the context of the equal protection clause. See note 14 *infra*.

12. RESTATEMENT (SECOND), AGENCY § 85(1) (1948).

concept announced in *Shelley v. Kraemer*,[13] which forbids judicial enforcement of private arrangements that would violate the equal protection clause of the fourteenth amendment if entered into by the state.[14] Thus, in excluding illegally seized evidence from a criminal trial without insistence on finding state action, the principal case represents a significant departure from the line of cases stemming from *Burdeau v. McDowell*.[15]

Recognizing that the lack of any official involvement in the illegal taking precluded exclusion of the evidence on federal constitutional grounds, the court turned to policy arguments to effect a similar result on non-constitutional grounds.[16] The objections of the court to the admission of illegally seized evidence have often been raised before.[17] The need to preserve the integrity of the law-enforcement process has led the courts to impose rigorous standards of behavior on the police and on themselves. Thus, the courts have recognized that disrespect for law and order is engendered when police and prosecutors are allowed to benefit from illegal acts. The state, it has been felt, ought to be the model rather than the evader of legal propriety.[18] The principal case adopted this rationale vis-à-vis the

13. 334 U.S. 1 (1948).

14. *Shelley* is primarily an equal-protection doctrine, as illustrated by the following cases in which the question of its applicability arose: Bell v. Maryland, 378 U.S. 226, 256 (1964) (concurring opinion); *id.* at 328 (dissenting opinion); Black v. Cutter Labs, 351 U.S. 292 (1956); Rice v. Memorial Park Cemetery, 348 U.S. 880 (1954); Barrows v. Jackson, 346 U.S. 249 (1953); Hurd v. Hodge, 334 U.S. 24 (1948); *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, *cert. denied*, 357 U.S. 570 (1958). There are other indications that the concept of state judicial action would not be applied to the principal case. First, there has been some reluctance to extend *Shelley* beyond its particular facts. See, *e.g.*, Black v. Cutter Labs, *supra;* Rice v. Memorial Park Cemetery, *supra; In re* Girard College Trusteeship, *supra*. Second, judicial involvement in admission of illegal evidence has been condemned on non-constitutional grounds as recently as 1960. Elkins v. United States, 364 U.S. 206, 222 (1960). See also Olmstead v. United States, 277 U.S. 438, 479 (1928) (dissenting opinion); Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (dissenting opinion). See generally Henkin, *Shelley v. Kraemer—Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Lewis, *supra* note 10, at 1108-20.

15. See cases cited note 7 *supra*. An even more radical departure from the *Burdeau* principle was the lower-court opinion in Sackler v. Sackler, 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct. 1962), *rev'd*, 16 App. Div. 2d 423, 229 N.Y.S.2d 61 (1962), which excluded evidence illegally obtained by the husband in a civil divorce action on the ground that *Mapp* "points the way" to exclusion where private persons are involved and that a New York law similar to the fourth amendment required exclusion of such evidence. See 48 CORNELL L. REV. 345 (1962); 46 MINN. L. REV. 1119 (1962); 72 YALE L.J. 1062 (1963). Compare Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958), discussed at note 8 *supra* and accompanying text.

16. While the court spoke in broad language of a fundamental constitutional right to privacy, it nowhere explicitly stated that the exclusion was based on such a right. See principal case at 5, 8.

17. *E.g.*, Elkins v. United States, 364 U.S. 206 (1960); cases cited note 18 *infra*.

18. See, *e.g.*, Blackburn v. Alabama, 361 U.S. 199, 207 (1960); Spano v. New York, 360 U.S. 315, 320 (1959); Olmstead v. United States, 277 U.S. 438, 478, 483 (1928) (dissenting opinions of Holmes and Brandeis, JJ.); Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (dissenting opinion by Brandeis, J.).

prosecutor and apparently extended it to private detectives, who in its view enjoy a "special status" under Michigan law and are bound to a higher standard of compliance with law than other citizens.[19]

Courts have also been unwilling to compromise their own integrity by becoming involved in attempts by the government to benefit from illegal acts. In *Elkins v. United States*,[20] the Supreme Court, exercising its supervisory power over federal courts, excluded from federal criminal prosecutions evidence illegally gathered by state officials and given to federal officials. This rejection of the "silver platter" doctrine was based partly on the ground that the "imperative of judicial integrity" demanded exclusion;[21] when courts permit the perpetration of illegal schemes they themselves become "accomplices in willful disobedience to law."[22]

Perhaps the most serious non-constitutional objection to permitting the use in evidence of the fruit of illegal private seizures is the opportunity for collusion between the police or prosecutor and private persons, especially detectives or informants. It seems clear that if a prior agreement between officials and private persons were proved, the evidence seized pursuant to the agreement would be constitutionally inadmissible, because the state itself would have conspired to violate the fourth amendment.[23] Thus, private illegal seizures could merely be a mask for constitutionally prohibited conduct, and otherwise inadmissible evidence might have to be admitted, under the *Burdeau* doctrine, unless collusion were actually proved. The principal case recognizes the danger of police-private party coalitions but fails to justify the exclusion of the evidence absent proof of such a coalition.[24]

Some support for excluding evidence without proof of collusion may be found in the difficulty for the defendant of proving an illicit agreement and in the inadequacy of other remedies to deter private illegal seizures. In many instances the defendant is not in a position to learn of, much less prove, the existence of an agreement between private persons and the police. Moreover, it seems doubtful that the right to call the alleged participants to testify would protect the defendant. The defendant may not even suspect the involvement of private persons; even if he does, he may not be able to

19. The "special status" is derived by the court from the fact that Michigan law requires a detective to be licensed, approved by the sheriff and the prosecutor in the area in which he intends to operate, and issued a metal badge by the state. See principal case at 15; MICH. COMP. LAWS §§ 338.801, .802, .808 (1948).

20. 364 U.S. 206 (1960).

21. *Id.* at 222.

22. *Id.* at 223, quoting McNabb v. United States, 318 U.S. 332, 345 (1943).

23. As to the degree of cooperation necessary to constitute a conspiratorial agreement and the problems posed by that issue in the silver-platter situation prior to *Elkins*, see Kamisar, *supra* note 9, at 1171-77.

24. See principal case at 13, 15.

identify the private participant. This could leave the defendant to establish existence of the agreement solely by the testimony of a public official who entered the agreement with the purpose of circumventing *Mapp v. Ohio.*

Despite the fact that private individuals do not enjoy the privileged status often afforded to police, civil remedies for illegal entry and seizure are unlikely to prove more effective against private individuals than they were before *Mapp* against the police.[25] The speculative or nominal nature of damages for trespass and invasion of privacy and the possible ignorance of aggrieved persons as to their right to compensation militate against the effectiveness of civil remedies as deterrents. Criminal sanctions, even where they exist,[26] tend to be ineffective, since the prosecutor would rarely, if ever, prosecute his own staff and would be very reluctant to jeopardize his relations with the police by prosecuting a policeman or his private accomplice.[27]

On the other hand, the existence of a prior agreement would seem to be less likely in connection with an illegal private seizure than in the typical "silver-platter" situation involving large numbers of individuals associated with two distinct, yet commonly cooperating law enforcement systems.[28] It would appear that at least in the clearest cases of illegal seizures by one or two identified private persons, the evidence could be admitted more freely without the danger that hidden agreements might lurk in the background. In such cases, a more moderate procedure might be preferable to automatic exclusion due to the mere possibility of a secret collusive agreement. For instance, where evidence admittedly seized illegally by an identified private person is offered and the possibility of collusion exists, a burden of persuasion might be placed upon the state to establish the lack of collusion.[29] The trial judge could then admit or exclude the evidence in his discretion, considering such factors as whether the private person is present for cross-examination, whether that person maintains a close working relationship with

25. As to the ineffectiveness of civil remedies as deterrents against illegal conduct by the police, see Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65 (1957). The "obvious futility of relegating the fourth amendment to the protection of other remedies," was recognized in *Mapp*, 367 U.S. at 652.

26. See generally Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955), indicating that such sanctions are not common and that where they do exist prosecutions are almost non-existent.

27. See Wolf v. Colorado, 338 U.S. 25, 42 (1949) (dissenting opinion).

28. See generally Kamisar, *supra* note 9, at 1180-90.

29. *Cf.* Hogan & Snee, *The McNabb-Mallory Rule—Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 28-29 (1958), suggesting that problems of proof in establishing coercion during prolonged pre-commitment detentions of the defendant might have been overcome by creating a rebuttable presumption of involuntariness. *But cf.* Kamisar, *supra* note 9, at 1192-93 n.382.

the police,[30] and whether the police at the time of the seizure were especially interested in the kind of activities in which the accused was allegedly engaged.

The principal case is illustrative of the conclusion that the theory that there may be secret agreements will not support the exclusion as a matter of law of *all* evidence illegally obtained by private persons. The detective and his assistant both testified, and there was no dispute as to whether anyone else was involved in the illegal entry. The court was careful to point out that in its opinion there was no collusion between the detective and the police.[31] Moreover, the case for exclusion to avoid possible secret agreements is not nearly so clear in a criminal adultery prosecution as it would be had there been an illegal private seizure in connection with an abortion, narcotics, or gambling prosecution. Adultery prosecutions are more likely to be the afterthought of an irate spouse than a prearranged plan of the police.

It seems clear that one effect of extending the exclusionary rule to unlawful private seizures would be to limit the amount and type of information that could be supplied to law enforcement agencies by informants, the extent of the limitation varying with the rationale used to exclude. Although exclusion because of the possibility of secret agreements is not constitutionally compelled, its purpose is to prevent hidden constitutional violations stemming from clandestine delegations by the police of their authority and from conspiratorial acquisitions of evidence. Thus, under this theory there would be no reason to exclude the ordinary informant's "tip" based on rumor or personal knowledge obtained by conduct which, even if illegal, did not constitute an "unreasonable search and seizure."

On the other hand, where the judicial-integrity approach is the rationale for exclusion, *any* information obtained by conduct deemed "illegal" could be excluded. However, the government's right to use informants is well established and has not been viewed as corrupting the law-enforcement process.[32] Nevertheless, it would seem that a distinction could be drawn between a situation in which the procurement of the evidence was merely incidental to the informant's illegal activity, such as incriminating statements heard

30. Such persons would include not only detectives and informers, but also individuals belonging to vigilante groups or extremist organizations, such as the Ku Klux Klan, which may have the sympathy of police departments in particular areas. See generally Black, *Burdeau v. McDowell—A Judicial Milepost on the Road to Absolutism*, 12 B.U.L. REV. 32 (1932).

31. Principal case at 15. A striking example of such collusion is People v. Rogers, 261 N.Y.S.2d 152 (1965), in which a telephone operator, after eavesdropping on the defendant's incriminating telephone conversations, voluntarily informed the police and thereafter cooperated with them in obtaining further evidence.

32. See generally HARNEY & CROSS, THE INFORMER IN LAW ENFORCEMENT 13-21 (1960); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Comment, 53 CALIF. L. REV. 840 (1965).

during an illegal gambling session, and one in which the evidence was obtained pursuant to a search and seizure the only purpose of which was the acquisition of evidence. It would appear that although the evidence in the former situation should be admissible to preserve the government's right to use informants, the latter evidence should be excluded where the state recognizes a legal right to be free from unauthorized intrusions.[33]

A second effect of the exclusion in criminal cases of evidence illegally gathered by private persons is that an analogy could be provided for excluding similar evidence in civil cases. Evidence illegally gathered by private persons is now admitted in civil cases everywhere except in Michigan,[34] while evidence illegally gathered by public officials is generally excluded from civil cases.[35] If exclusion in criminal cases were based on the possibility of collusion, no analogy for exclusion in civil cases would exist unless the state were involved in the suit. However, the need to "preserve the judicial process from contamination,"[36] which is the basis of the judicial-integrity concept, would seem to be as real in civil actions as in criminal and thus would demand exclusion in both. Since the integrity of the court rather than that of the plaintiff is involved, the rule could lead to the harsh result that the plaintiff would lose an otherwise valid right to compensation merely by introducing illegally seized evidence without knowing of its illegal seizure.[37] On the other hand, it has been argued that exclusion is the only effective deterrent against persons willing to run the risk of a light penalty in order to obtain valuable evidence for use in civil actions.[38]

The result in the principal case seems consistent with Michigan

33. See generally Edwards, *supra* note 26; Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). In the few states that do not recognize a right to privacy, the evidence could be admissible since the search and seizure was not technically illegal. Even here, however, a broad reading of the judicial-integrity approach could require exclusion where the conduct, although not illegal, was highly improper.

34. *E.g.*, Calumet Broadcasting Corp. v. FCC, 160 F.2d 285 (D.C. Cir. 1947); Munson v. Munson, 27 Cal. 2d 659, 166 P.2d 268 (1946); Herrscher v. State Bar, 4 Cal. 2d 399, 49 P.2d 832 (1935) (disbarment proceeding); Sackler v. Sackler, 16 App. Div. 2d 423, 229 N.Y.S.2d 61 (1962); Thanhauser v. Milprint, 9 App. Div. 2d 833, 192 N.Y.S.2d 911 (1959). *But see* Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958).

35. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700, 702 (1965); Frank v. Maryland, 359 U.S. 360, 375-76 (1959) (dissenting opinion) (dictum); Rogers v. United States, 97 F.2d 691 (1st Cir. 1938) (action for recovery of customs duties). In *Plymouth Sedan, supra*, the Supreme Court ruled that exclusion is required in forfeiture actions whenever there is an illegal search and seizure. Part of the reason given, however, was that forfeitures are "quasi-criminal." See also De Reuill, *Applicability of the Fourth Amendment in Civil Cases*, 1963 DUKE L.J. 472.

36. Olmstead v. United States, 277 U.S. 438, 484 (1928) (dissenting opinion of Brandeis, J.).

37. See, *e.g.*, Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958), where plaintiff was saved from that fate only because the court, after excluding the evidence, found the verdict in her favor sufficiently supported by other evidence.

38. Note, 8 UTAH L. REV. 84, 87 (1962).

law recognizing a right to be free from unauthorized interference with privacy,[39] and with the prior cases which have not demanded state action as a prerequisite to the exclusion of objectionably obtained evidence.[40] While it is clear that because of the absence of official participation in the search and seizure the exclusion was not compelled by *Mapp*, the general aim of the case—to deter direct or indirect invasions of privacy—is consistent with the broad policy of the exclusionary rule. The exclusion seems justified on the ground that the integrity of law enforcement demands that its operations not conflict with public policy. In resolving the issue posed by the competing considerations of law enforcement and the individual's right to privacy, the principal case has accepted the basic proposition that law enforcement and society in general are not benefited in the long run when they permit a criminal conviction at the expense of humiliating intrusions by unauthorized persons upon the defendant's privacy.

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39. See generally Plant, *The Right of Privacy in Michigan*, Mich. State B. J., March 1954, p. 8.

40. Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958); People v. Corder,