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Constitutional Law - Search and Seizure - Evidence of Prior Search as Bearing on Credibility of Defendant's Testimony

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE—EVIDENCE OF PRIOR SEARCH AS BEARING ON CREDIBILITY OF DEFENDANT'S TESTIMONY—In 1952 petitioner was indicted in a federal court, charged with illegal sales of narcotics. During direct examination by his counsel, petitioner denied ever having had possession of narcotics. On cross-examination by the government, petitioner repeated his denial and continued to do so even when the government questioned him, over his objection, concerning a heroin capsule unlawfully seized in his home in 1950. Evidence of the unlawful seizure in 1950 had been ruled inadmissible in an earlier trial. Petitioner's denials were squarely in conflict with an affidavit he had filed at the earlier trial.[1] In rebuttal, the government introduced testimony showing the seizure of the capsule from the defendant in 1950. The trial judge admitted the evidence of the previous seizure and charged the jury that the testimony was admitted solely for purposes of impeaching petitioner's credibility. Petitioner was convicted, and the court of appeals affirmed. On certiorari to the United States Supreme Court, *held*, affirmed, Justices Black and Douglas dissenting. In a prosecution for unlawful sales of narcotics, the assertion by petitioner on direct examination that he had never possessed any narcotics opened the door, solely for the purpose of attacking his credibility, to evidence that narcotics had been unlawfully seized from him in connection with an earlier prosecution. *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354 (1954).

Effective protection of basic civil liberties often conflicts with society's interest in efficient law enforcement. This is especially true with respect to the freedom from unreasonable search and seizure guaranteed by the Fourth Amendment.[2] The substantive content of this freedom and the sanctions used to prevent illegal police activities represent a compromise between the concern for individual liberty and the desire for vigorous law enforcement.[3] In *Weeks v. United States*[4] the Supreme Court resolved the conflict in favor of the ag-

[1] The affidavits were filed pursuant to the Federal Rules of Criminal Procedure, Rule 41(e), 18 U.S.C. (1952).

[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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST., Amend. IV.

[3] See Carroll v. United States, 267 U.S. 132, 149, 45 S.Ct. 280 (1925).

[4] 232 U.S. 383, 34 S.Ct. 341 (1914). Of course, the exclusionary rule announced in the Weeks case applies only to the federal courts. In Irvine v. California, 347 U.S. 128, 74 S.Ct. 381 (1954), the Court held that the Fourteenth Amendment does not forbid the

grieved defendant, excluding from evidence in the federal courts the fruits of an illegal search conducted by federal officers. In *Silverthorne Lumber Co. v. United States*[5] the *Weeks* rule was extended to prohibit the government from making indirect use of the evidence obtained through an unlawful search and seizure to secure a conviction; and in *Nardone v. United States*[6] the Court stated that the government could not use leads obtained from such a search and seizure for that purpose. Certainly it is difficult to reconcile the holding of the principal case with a too literal interpretation of the words of Justice Holmes in the *Silverthorne* case, when he said, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[7] When, as in the present case, the defendant is caught in a deliberate perjury through the use of evidence not otherwise admissible, the psychological effect on the jury cannot be underestimated. Even with the careful limitations imposed by the trial judge, it is nevertheless improbable that a jury can completely dismiss the subjective implications of such evidence from their minds. It would appear that if the direct examination of the petitioner in the instant case had concerned elements of the crime charged, then the evidence of the previous seizure would not have been admissible, under the rules of the *Weeks, Silverthorne,* and *Nardone* cases. However, it is a familiar rule of evidence that while the prosecution is not permitted to inquire into the character of the defendant, yet, once the defendant himself, or more commonly witnesses for him, attempt to prove his good character, which apparently petitioner's counsel attempted to do in the instant case by asking the broad question concerning previous possession of narcotics,[8] then he has opened the door to attacks upon his reputation by the prosecution.[9]

admission in state courts of evidence obtained by illegal searches and seizures, except where the illegal search involves an assault upon the person. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1951), is illustrative of the exception.

[5] 251 U.S. 385, 40 S.Ct. 182 (1920).

[6] 308 U.S. 338, 60 S.Ct. 266 (1939).

[7] Silverthorne Lumber Co. v. United States, note 5 supra, at 392.

[8] Unless the very broad question concerning previous possession of narcotics was asked by counsel in an attempt to establish the good name of his client, it appears that it was completely out of place and inadmissible, for it does not tend to establish or destroy any element of the offense with which the defendant was charged.

[9] Cf. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213 (1948), for a discussion of this principle. The Court said, at page 479: "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue." Cf. United States v. Corrigan, (2d) Cir. 1948) 168 F. (2d) 641 at 645, where the court said, "The doctrine of 'opening the door' is an application of the principle of 'completeness'; that is, if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary."

The statement generally made that evidence admissible for a limited legitimate purpose cannot be excluded because it is incompetent or prejudicial for another purpose[10] provides very little aid in the present case. Indeed, it does little more than beg the question, for the crucial inquiries are whether evidence such as that present here is admissible and whether it is for a limited legitimate purpose. However, when the evidence is used solely to impeach the credibility of a witness or the accused, it appears that courts admit evidence, otherwise inadmissible for one reason or another, almost automatically.[11] Perhaps it can be said that the principal case represents a retreat from the broad area of the *Weeks* doctrine. In the final analysis, however, it appears that the Supreme Court balanced the policy considerations suggested earlier in this writing and concluded that the private interest involved was not meritorious. While the government should not be able to make affirmative use of evidence unlawfully seized, the defendant, on the other hand, should not be allowed to perjure himself and use the protection of the *Weeks* doctrine to cover that perjury.[12] Surely this is a compelling policy consideration.

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[10] 1 WIGMORE, EVIDENCE, 3d ed., §13 (1940).

[11] See Dowling Bros. Distilling Co. v. United States, (6th Cir. 1946) 153 F. (2d) 353, cert. den. 328 U.S. 848, 66 S.Ct. 1120 (1946), rehearing den. 329 U.S. 820, 67 S.Ct. 29 (1946); United States v. Skidmore, (7th Cir. 1941) 123 F. (2d) 604.

[12] See the opinion of Justice Frankfurter in the principal case at 65, where he states: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment."