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Illegal Search and Seizure--Power of a Federal Court to Enjoin a Federal Agent From Testifying in a State Court

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of the witness. This is particularly true since the expert witness will be subject to cross examination as to the methods and validity of the testing process.

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ILLEGAL SEARCH AND SEIZURE—POWER OF A FEDERAL COURT TO ENJOIN A FEDERAL AGENT FROM TESTIFYING IN A STATE COURT—The United States Constitution prohibits illegal searches and seizures,[1] but makes no mention of the admissibility of evidence so obtained before a court. Until this century both federal and state courts accepted the common law rule that, with few exceptions, evidence otherwise admissible need not be excluded because it is illegally obtained.[2] The specific rule that in the field of searches and seizures evidence should be excluded if it has been illegally seized was first laid down by the Supreme Court of the United States some seventy years ago.[3] But it was not until 1914 that the rule was clearly enunciated by that Court in *Weeks* v. *United States*[4] in which the Court held that evidence illegally obtained by federal officials in violation of the Fourth Amendment is inadmissible in a federal prosecution.[5] However, generally, the Supreme Court has not seen fit to

[1] U.S. Const., Amend. 4:
> "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 warrant 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."

[2] 8 Wigmore, Evidence Secs. 2183, 2184 (3d ed. 1940). The rationalization for the rule is that to exclude such evidence would only be to free the guilty, i.e., one malefactor should not claim the right to escape prosecution by reason of the illegal acts of another. Also, if the evidence is relevant, any argument as to the illegality of obtaining it is merely a "collateral issue."

[3] Boyd v. United States, 116 U.S. 616 (1886).

[4] 232 U.S. 383 (1914). The common law power of courts to develop rules for the admissibility of evidence is a well recognized judicial function.

[5] Id. at 393,
> "If letters and private documents can be thus taken and held and used as evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

For a criticism of this rule see 8 Wigmore, Evidence, Sec. 2184 at 40 (3d ed. 1940) in which he states,
> "The natural way to do justice here would be to enforce the healthy principle of the Fourth Amendment directly, i.e. by sending for the high-handed, over-zealous marshall who had made a search without a warrant ,imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal."

As a reply to this, it should be noted that prosecutions of the "over-zealous marshal" have proven to be ineffective, as have civil actions against him.

exclude from federal prosecutions illegally seized evidence unless a federal officer perpetrated the wrong or state officials acted solely for the purpose of enforcing federal law.[6]

The Supreme Court in *Wolf* v. *Colorado*[7] held that in a state prosecution for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. Consequently, the adoption of the exclusionary rule is discretionary with the individual state's court.[8] The Supreme Court reaffirmed the *Wolf* holding in *Stefanelli* v. *Minard*[9] in denying the petitioner's motion to enjoin directly a state official from using evidence seized in violation of the Federal Civil Rights Statute.[10] In *Stefanelli* v. *Minard* the Court declared that although it had the power to enjoin the use of the state seized evidence, it should refuse to exercise its discretionary equity powers to "interfere with or embarrass threatened proceedings in State courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent," because the issuance of such an injunction would upset the "special delicacy of the adjustment to be preserved between federal equity power and state administration of its own law" and thus "would invite a flanking movement against the system of state courts by resort to the federal forum."[11]

It should be noted that in all the cases in which the federal courts have applied the federal exclusionary rule they have done so solely for the purpose of admitting or rejecting evidence before federal courts in federal prosecutions. However, in a recent case[12] the Supreme Court by an assertion of a general supervisory power over federal law enforcement officials put what, under the spirit and rationalizations

[6] Gambino v. United States, 275 U.S. 310 (1927); United States v. Butler, 156 F. 2d 897 (CCA10 1946).

[7] 338 U.S. 25 (1948).

[8] Twenty-one states, including Kentucky, have adopted the exclusionary rule (for a list of these states see 50 A.L.R. 2d 536). Twenty-five states follow the old common law rule without qualification while two qualify it in certain respects (50 A.L.R. 2d 543). Kentucky does not allow the admission of evidence obtained by an illegal search and seizure by either state officials, Parrott v. Commonwealth, 287 S.W. 2d 440 (Ky. 1956), or federal officials, Walters v. Commonwealth, 199 Ky. 182, 250 S.W. 839 (1923). However, such evidence is not inadmissible if secured by a private person acting on his own initiative, Gilliam v. Commonwealth, 263 Ky. 342, 92 S.W. 2d 346 (1936).

[9] 342 U.S. 117 (1951).

[10] R.S. Sec. 1979 (1875), now 42 U.S.C.A. Sec. 1983 (1952). The Supreme Court declared in this case, just as it did in Schwartz v. Texas, 344 U.S. 199 (1952), that in the absence of an express intent by Congress, the Court should interpret such acts as not to make illegally seized evidence inadmissible in state court proceedings.

[11] Supra note 9 at 120, 122, 123.

[12] Rea v. United States, 350 U.S. 214 at 216, 217 (1956).

of previous decisions,[13] is constitutionally admissible evidence beyond the reach of a state court and thereby, in effect, imposed the federal exclusionary rule on a state court in regard to evidence seized illegally by a federal law enforcement official while acting under a defective federal search warrant.

In this case the petitioner was indicted under a federal statute for the unlawful acquisition of marijuana based on evidence obtained by a federal narcotics agent acting under a search warrant issued by a United States Commissioner. On a motion by the petitioner, the district court suppressed the evidence on the ground that the warrant was insufficient on its face and dismissed the indictment. Subsequently, the federal agent swore to a complaint in a New Mexico state court and the petitioner was charged with violation of the state narcotics act. Petitioner then sought in a federal district court to enjoin the federal agent from testifying in the state court with respect to the evidence obtained by virtue of the improper search warrant.[14] The District Court denied the motion and on appeal the Circuit Court affirmed. The Supreme Court of the United States by a 5-4 decision reversed the Circuit Court, holding that a federal court could enjoin a federal law enforcement official from testifying in a state criminal case with respect to evidence obtained by him while acting under an invalid federal search warrant. *Rea* v. *United States*, 350 U.S. 214 (1956).

The majority opinion put all constitutional issues to one side stating that this is merely a case involving the federal court's supervisory powers over federal law enforcement officials and not affecting in any way the use which New Mexico might make of the unlawfully seized evidence. The Court declares that the powers of the federal courts extend to policing and enforcing the requirements of the Federal Rules governing searches and seizures.[15] The Court further declares that, since a federal agent has violated those Rules, to enjoin him from testifying is merely to enforce the Rules against those owing obedience to them.[16]

As was conceded by the dissenting opinion, since the federal law

[13] Supra note 7 and note 9.

[14] Fed. R. Crim. P. 41(e), 18 U.S.C. (1952).

[15] Fed. R. Crim. P. Rule 41, 18 U.S.C. (1952), regulates the conduct of searches and seizures. Rule 41(c) in particular was violated. Federal courts have the power to control the disposition of contraband, the marijuana here, under 28 U.S.C. Sec. 2463 (1952), but this section provides no support for enjoining the testimony.

[16] Since the Federal Rules of Criminal Procedure are specifically made applicable only to proceedings before the federal judiciary, there appears little justification for holding that the Rules govern the conduct of federal officials in state courts. Fed. R. Crim. P. 54(a); see 18 U.S.C. Secs. 377-72 (1952).

enforcement official was acting under an implied federal search warrant the Court undeniably had the power to issue the injunction,[17] but previously, in regard to the use of illegally seized evidence in state prosecutions, the Court had said that federal courts under their discretionary powers should refuse "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent. . . ."[18] In *Stefanelli* v. *Minard* the court held that no such "irreparable injury" was threatened although a conviction hinged upon the introduction of the illegally seized evidence.

As noted previously, under the decisions of the *Wolf* case and its successors the illegality of the seizure of the evidence does not necessarily bar its admission in a state prosecution. However, in the present case the court distinguished *Wolf* v. *Colorado*[19] and *Stefanelli* v. *Minard*[20] in which action was sought directly against a state court or state officials, on the ground that the Court was "not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law."[21] But since the enjoined evidence was the sole basis of the state prosecution, this reasoning is illusory for, as recognized by the dissenting opinion, the injunction would "operate quite as effectively, albeit indirectly, to stultify the state prosecution as if it had been issued directly against New Mexico or its officials."[22]

Thus the federal rule of exclusion, which the Court has held that it would not impose on the states directly,[23] is her imposed indirectly by use of the Court's supervisory power.[24]

Equally astonishing as the Court's declaration of such an indirect power over state courts is its assertion of a general supervisory power over federal executive law enforcement officials. Since the enjoined official was a member of the executive branch of the federal government this decision results in a judicial encroachment into the hereto-

[17] Wise v. Henkel, 220 U.S. 556 (1911), cited by the majority, supports the assertion that the Court has the power to correct an abuse of its process by means of an injunction.

[18] Supra note 9 at 122; Douglas v. City of Jeanette, 319 U.S. 157, 163 (1943).

[19] Supra note 7.

[20] Supra note 9.

[21] Supra note 12 at 216.

[22] Supra note 12 at 219.

[23] Supra note 7.

[24] "The concept of supervisory power of the standards of admissibility of evidence originated in England as a judicial method to curb the police abuses in obtaining evidence. The court promulgated rules for police officers in their interrogation of persons under custody. Strict adherence to the rules was a condition precedent to the admissibility of confessions as evidence." 30 Temple L.Q. 68, 69, citing McCormick, Hand Book of the Law of Evidence 240 (1954).

fore exclusive domain of the executive.[25] As authority for its general supervisory power over law enforcement agents of the executive, the Court cites *McNabb* v. *United States*,[26] which stands for no such broad proposition as that asserted here. *McNabb* v. *United States* stands for the limited proposition that federal courts have a supervisory power over federal law enforcement agencies in that by admitting or rejecting in federal court the evidence obtained by such agencies the courts control the conduct of the agencies to that limited extent.[27] But in *Rea* v. *United States* there existed no such situation as that of *McNabb* v. *United States* as the evidence was not to be presented in a federal court in a federal prosecution but rather in a state court in a state prosecution.[28] Further, it should be noted that under the rationale and spirit of the rule in the *Wolf* case a conviction in the present case would not have been reversed for that would have been, in effect, to destroy the "special delicacy of the adjustment to be preserved between federal . . . power and State administration of its own law."[29]

On the other hand, if the state were subsequently to subpoena the enjoined federal official to testify he would be caught between two contradictory court processes in which case the controversy, under the federal supremacy doctrine, would be resolved in favor of the federal court[30]—thus reaching a result which could hardly be contended does not disturb the "adjustment" spoken of above.[31]

In view of the adverse effect of this decision on the executive branch of the federal government, and the objectionable rationale by which the power of a state court is restricted, it is submitted that the

[25] In the words of Justice Harlan who wrote the dissenting opinion, "So far as I know this is the first time it has been suggested that the federal courts share with the executive branch of the Government responsibility for supervising law enforcement activities as such." Supra note 12 at 218.

[26] 318 U.S. 332 (1943). This case held that a confession obtained by a federal official during a period of illegal confinement in violation of a federal statute is inadmissible in a federal prosecution. However, this rule has been held to be not applicable to state prosecutions so long as the confession is given voluntarily. Gallegos v. Nebraska, 342 U.S. 55 (1951).

[27] The Court in the McNabb case expressly so limited itself and on this very point declared, "We are not concerned with law enforcement practices except in so far as courts themselves become instrumentalities of law enforcement." McNabb v. United States, supra note 19 at 347.

[28] Heretofore the Court had refused to extend the basic principle of the McNabb rule to state prosecutions. Gallegos v. Nebraska, supra note 20 at 63-64; Stein v. New York 346 U.S. 156, 186-188 (1953).

[29] Supra note 9 at 120.

[30] Ableman v. Booth and United States v. Booth, 62 U.S. 506 (How. 1858).

[31] Also the outcome of such a state prosecution as the instant case would be dependent upon the fortuitous circumstances as to which could be secured first—a federal injunaction or a state conviction. Such circumstances would promote the introduction of surprise witnesses.

Supreme Court should have refrained from the exercise of its discretionary power in the present case. Upon an appeal from a conviction, the court would then be compelled to consider the admissibility of such evidence in a proceeding to which a state would be a party, thereby confronting the Court directly with the problem of federal-state relations.

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TORTS—INTENTIONAL—WRONGFUL DEATH BY LIQUOR—Administratrix of one whose death was caused by drinking a bottle of whiskey sued the vendor of the whiskey under the wrongful death statute.[1] The complaint alleged that defendant, while acting within the scope of his employment as a clerk of a co-defendant, a licensed retailer of packaged liquor, sold the deceased a quart of whiskey for the purpose of injuring him, knowing him to be intoxicated at the time;[2] that the defendant knew that the deceased had bet with another person that he, the deceased, could drink the quart of whiskey without stopping; that defendant knew that it was for the purpose of settling the bet that the deceased bought the whiskey and knew that he intended to drink all of it without stopping; that defendant should have known that the deceased could not safely be trusted with the whiskey but that he sold it to him anyway for the purpose of injuring him. The trial court dismissed the complaint on the ground that it did not state a claim on which relief could be granted.[3] *Held:* Reversed. The Court of Appeals held that the administratrix of one killed by drinking an excessive quantity of whiskey can maintain an action against the vendor who sold the whiskey to deceased for the purpose of injuring him. *Nally* v. *Blandford,* 291 S.W. 2d 832 (Ky. 1956).

The decision was based primarily on statements made in *Britton's Adm'r.* v. *Samuels.*[4] In that case the defendant, knowing plaintiff's intestate was an inebriate and intoxicated at the time, sold him whiskey

[1] Ky. Rev. Stat. 411.130 (hereinafter cited as K.R.S.)

[2] The sale of whiskey to a person actually or apparently intoxicated is a violation of K.R.S. 244.080. In Tate v. Borton, 272 S.W. 2d 333 (Ky. 1954) "intoxication" is defined as being under the influence of alcohol to such an extent that the physical and mental faculties are affected and the judgment impaired. This may be something less than "drunkenness" which the court said is excessive intoxication but does not necessarily mean stupefaction or helplessness.

[3] Kentucky Rules of Civil Procedure, 8.01. Of these rules Commissioner Stanley recently said:

> "But the simplification and liberality extend to the manner of stating a case and are not so great as to obviate the necessity of stating the elements of a cause of action or defense, as the case may be."

[4] 143 Ky. 129, 136 S.W. 143 (1911).
Johnson v. Coleman, 288 S.W. 2d 348, 349 (Ky. 1956).