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Constitutional Law—Exclusionary Rule Applied to State Liquor Authority Administrative Searches

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CONSTITUTIONAL LAW—EXCLUSIONARY RULE APPLIED TO STATE LIQUOR AUTHORITY ADMINISTRATIVE SEARCHES

Agents of the New York State Liquor Authority, with the consent of the store manager to inspect the premises, found slips indicating illegal credit sales in a coat hanging in the rear room of the store. Although the licensee's principal identified the slips taken from his coat at the time of the inspection, he refused to answer any questions when interviewed at the offices of the Authority. At a hearing, the State Liquor Authority ordered a ten day suspension of his liquor license, invoked forfeiture of a $1000 bond and issued a letter of warning. The evidence justifying this action was the seized sales slips and Mr. Finn's earlier admissions regarding them. The Appellate Division reversed.[1] The Court of Appeals affirmed the decision of the Appellate Division. *Held*, the State Liquor Authority does not, and may not constitutionally, have a broad grant of statutory power to support a determination on evidence derived from a general submission to a warrantless search, and, further, the exclusionary rule of *Mapp v. Ohio*[2] is applicable to bar the introduction of illegally seized evidence in administrative hearings. *Matter of Finn's Liquor Shop, Inc. v. State Liquor Authority*, 24 N.Y.2d 647 (1969).[3]

In *Mapp v. Ohio*, the Supreme Court stated that evidence obtained in violation of the fourth amendment prohibition against unreasonable search and seizure would be inadmissible in a criminal trial in a state court.[4] The fundamental purpose of the rule was to protect the rights of criminal defendants and third parties by deterring law-enforcement officials from making illegal searches.[5]

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1. *In re* Finn's Liquor Shop, Inc. v. State Liquor Authority, 31 A.D.2d 15, 294 N.Y.S.2d 592 (1st Dep't 1968). The Appellate Division annulled the determination of the Authority on the grounds that the sales slips, and the statement explaining them were obtained in violation of the petitioner's constitutional rights and should have been excluded as evidence. Refusal by Finn to respond to questioning at an interview was alone insufficient to support the decision.

2. 367 U.S. 643 (1961).

3. *Cert. denied*, — U.S. — (1969). *Finn* was decided with two companion cases. In *In re* La Penta v. State Liquor Authority, 24 N.Y.2d 647 (1969), agents obtained evidence of illegal gambling by using a wiretap order and a search warrant. The county court, in a criminal proceeding, had voided the eavesdropping order and the search warrant, but the evidence so gathered was admitted in a proceeding by the State Liquor Authority that resulted in cancellation of the petitioner's license. Affirming the Appellate Division, the Court of Appeals held that the order of the county court with respect to the lawfulness of the search was binding on the State Liquor Authority.

In *In re* Malik v. State Liquor Authority, 24 N.Y.2d 647 (1969), two police officers seized records and materials used for bookmaking in the petitioner's tavern during a search incident to an arrest. In a criminal proceeding, the city court suppressed the evidence. However, the State Liquor Authority used this evidence as the basis for suspending the petitioner's license for ten days and imposing a $1000 bond claim. The Appellate Division reversed. The Court of Appeals affirmed the Appellate Division and held, as it did in *La Penta*, that the State Liquor Authority is bound by the decision of a court and may not make an independent finding on the validity of the search.

4. 367 U.S. at 655.

5. Manwaring, *Administrative Inspections and the Fourth Amendment—A Rationale*, 65 COLUM. L. REV. 288 (1965).

Camara v. Municipal Court[6] expanded the application of the rule to evidence obtained by unconstitutional searches in administrative proceedings where criminal penalties were involved. The fourth amendment was held to protect one who refused to permit inspection of his home by a health inspector when no warrant was presented. In a companion case,[7] a party refused to allow a fire-department investigator to inspect a commercial warehouse without a warrant, arguing there was no probable cause to investigate for a violation of the Seattle Fire Code. The court held that in carrying out a routine inspection, an investigator could only enter the non-public areas of a commercial warehouse through the warrant procedure. While *Camara* applied to a private dwelling, its rationale was expended to apply to searches of a business as well as the home.

Infringement of fourth amendment rights has been frequently alleged where investigators, without a warrant, enter business premises under statutory authority to inspect books and records required by law. In such situations, the federal courts have upheld the constitutionality of the search and seizure.[8]

In *Incorporated Village of Laurel Hollow v. Laverne Originals, Inc.*,[9] the leading case discussing the question of the applicability of the exclusionary rule to administrative proceedings, a village building inspector obtained evidence by unlawfully entering the defendant's premises. Although the proceeding was civil, the punishment involved, a fine or imprisonment, was characteristically penal. The New York Court of Appeals declared the evidence improperly admitted as the product of an unlawful search.[10]

Correspondingly, *Leogrande v. State Liquor Authority*,[11] a case involving a business premises, the police entered a tavern pursuant to a search warrant which was later invalidated. The search netted evidence of gambling activities. The Appellate Division annulled the revocation of the license by the State Liquor Authority on the ground that the exclusionary rule embraces "any official proceeding brought to impose official forfeitures, penalties, or similar sanctions for violations of law or regulation."[12]

Leogrande is consistent with both the New York and federal decisions in further defining the exclusionary rule. The *Mapp* rule, initially confined to the criminal area, has been held to cover many different types of searches. *Leogrande* indicated that in New York the rule would be extended to administrative proceedings.

The investigative jurisdiction of the New York State Liquor Authority is

6. 387 U.S. 523 (1967), where there was an alleged violation of the apartment building's occupancy permit under the San Francisco Housing Code.

7. See v. City of Seattle, 387 U.S. 541 (1967).

8. *See* Davis v. United States, 328 U.S. 582 (1946); Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962); United States v. Crescent-Kelvan Co., 164 F.2d 582 (3d Cir. 1948).

9. 17 N.Y.2d 900, 218 N.E.2d 703, 271 N.Y.S.2d 996 (1966).

10. *Id.*

11. 19 N.Y.2d 418, 227 N.E.2d 302, 280 N.Y.S.2d 381 (1967). The Court of Appeals was prevented from deciding the issue of the validity of the method of gathering evidence because the point was not preserved for appeal by objection in the lower court.

12. 25 A.D.2d 225, 227, 268 N.Y.S.2d 433, 436 (1st Dep't. 1966).

set forth in the Alcoholic Beverage Control Law.[13] Section 105 governs licensees like Finn who sell at retail for off-premises consumption. Unlike section 106, which concerns retail licensees for consumption on the premises, section 105 contains no clause regulating inspection of the premises. The State Liquor Authority has, however, interpreted section 105 to contain by implication the authority for search of the premises. Even if the State Liquor Authority's interpretation is correct, the Supreme Court has required more than a broad statute authorizing inspections. In *See v. City of Seattle*,[14] the inspector, pursuant to the relevant statute, had a written notice of inspection. The Court said,

> The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena.[15]

Since *See*, the Second Circuit Court of Appeals, reviewing a statutory provision permitting warrantless searches concluded that the inspector was limited to a specific type of search, i.e. the place where the liquor is kept and the alcoholic beverages. The court has stated that this limited authority did not permit a search of the owner's home or clothing.[16]

An otherwise constitutionally prohibited search can be rendered legal by

13. The New York Alcoholic Beverage Control Law (McKinney 1946) provides:
Section 17, Powers of the authority.

. . . .

7. To inspect or provide for the inspection of any premises where alcoholic beverages are manufactured or sold.

Section 105, Provisions governing licensees to sell at retail for consumption off the premises.

. . . .

15. Each retail license for off-premises consumption shall keep and maintain upon the licensed premises, adequate books and records of all transactions involving the business transacted by the licensee . . . Such books and records shall be available for inspection by any authorized representative of the liquor authority.

Section 106, Provisions governing licensees to sell at retail for consumption on the premises.

. . . .

12. Each retail licensee for on-premises consumption shall keep and maintain upon the licensed premises, adequate books and records of all transactions involving the business transacted by such licensee . . . . Such books and records shall be available for inspection by any authorized representative of the liquor authority.

. . . .

15. All retail licensed premises shall be subject to inspection by any peace officer and by the duly authorized representatives of the liquor authority, or the appropriate board during the hours when the said premises are open for the transaction of business.

14. 387 U.S. 541 (1967).

15. *Id.* at 544.

16. Colonnade Catering Corp. v. United States, 410 F.2d 197, 201 (2d Cir. 1969) (inspection by Internal Revenue Service investigators of locked liquor storeroom was upheld as reasonable since agents acted within restricted statutory authority). *See* United States v. Frisch, 140 F.2d 660 (5th Cir. 1944) (the area available for inspection of books, records, and inventory without a warrant is the business premises, and does not include the upper floor of a building, not a part of the bar). The Court in *Colonnade* cited the Appellate Division decision in *Finn*.

consent or waiver.[17] In order to evaluate the validity of a warrantless search with consent, the courts have set up criteria for determining when fourth amendment rights have been waived. The consent must reflect a knowledgeable and "unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld."[18] The mere submission to authority does not make an effective waiver, since the consent must be freely given, without duress or coercion.[19]

In the instant case, the majority of the court found that, contrary to the State Liquor Authority's opinion, the Law did not include the right to inspect the premises of retailers who sell for consumption off the premises.[20] Assuming *arguendo* that a search of the premises was within the agency's investigative jurisdiction, the majority did not believe that the search of the coat was constitutionally justified. The Court questioned the validity of a statute that would give a broad grant of power to conduct a warrantless search of the premises.

The majority and dissenting opinions differed with respect to the right of the state to require submission to warrantless searches as a condition of doing business. The dissent, contending that the liquor industry requires strict regulation, read the New York statute to authorize a normal inspection of the premises, including a search, contending that implied consent to inspection and limited waiver of fourth amendment rights are an inherent condition for the acceptance of the license.[21] Furthermore, the dissenting justices thought that any constitutional issue was avoided by the existence of consent.[22] The majority did not specifically discuss consent, but their decision implies that such alleged conduct was not a valid waiver of the petitioner's rights.[23]

The majority and dissenting opinions in *Finn* suggest that measuring the scope of reasonable investigation involves considering not only the method of gathering evidence, but the type of activity being regulated. Since the highest

17. In some states, the licensing statute contains a section which expressly conditions licensing on the consent of the applicant to a warrantless search of his premises. The New York statute does not contain such a provision. *See* Oklahoma ABC Board v. McCulley, 58 Cal. 2d 806, 377 P.2d 568 (1962); Brown v. State, 391 S.W.2d 425 (Texas 1965); Silber v. Bloodgood, 177 Wis. 608, 188 N.W. 84 (1922).

18. Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965). *See* United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968) (a Food and Drug Inspector, although he had a notice of inspection, was refused permission to inspect the books and records. The Court cited *Cipres* and *Karwicki v. United States*, 55 F.2d 225 (4th Cir. 1932), for authority that it must be clear that the area searched is covered by the consent.).

19. *See* Johnson v. Zerbst, 304 U.S. 458 (1938); Amos v. United States, 255 U.S. 313 (1921); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951). *Contra*, United States v. Duffy, 282 F. Supp. 777 (S.D.N.Y. 1968) (defendant, having made no protest or objection to the inspection, was deemed to have consented by his conduct).

20. Instant case at 653.

21. *Id.* at 664.

22. *Id.* at 665.

23. *Id.* at 658. In *Malik* and *La Penta*, the illegality of the method of gathering evidence had been decided previously in a criminal action. Since the agency was faced with a prior court decision in each case, no member of the Court approved the agency's attempt to review that decision for purposes of making an administrative determination. The exclusionary rule was applied as it had been in *Finn*, once the issue of the illegality of the seizure of the evidence had been resolved.

court in New York State has now applied the exclusionary rule to the introduction of illegally obtained evidence by the Authority, both the agency and its licensees will develop more sophistication in asserting their respective rights with regard to the enforcement of liquor regulations. In cases where a court has determined the legality of the search prior to any agency action, the agency is clearly bound to act in accord with that decision. However, in the *Finn* situation, where a court seemed to state that general warrantless searches conducted by administrative agencies will not be tolerated, and that "consent" will be required, effective regulation by the agency will be more difficult. If the licensee consents to the inspection, and his waiver is precise and exercised with knowledge of the consequences, the Court of Appeals might accept the evidence obtained.

It must be remembered that under the *Finn* ruling administrative law-enforcement officials may still enter business premises that are open to the public and inspect the books and records required by law. Also, if a search of the premises is required, the warrant procedure is still available, and the liquor authority's formulation of general policy, supervision, and prosecution, will not seriously interfere with the licensee's rights to conduct his business free from arbitrary harrassment.

The burden of obtaining warrants may, of course, have a deleterious consequence on effective administrative regulation. Refinements in the inspection procedure might result in increased confusion on the part of enforcement authorities, the courts, and licensees. Not only might the courts have problems deciding when an inspection may be authorized, but both the agency and the licensees might misunderstand their duties and rights in borderline situations.

In administrative searches critics claim that an expansive reading of the fourth amendment rights will lead to an excessive burden on these agencies and a resultant loss of respect for the courts if they serve as rubber stamp magistrates. While it is necessary to provide redress for wrongs resulting from an illegal search, the use of the exclusionary rule need not be the sole solution. For instance, one suggestion is that tort law be amended to include liquidated damages and government liability in civil actions brought by the injured party.[24] The spectre of a tort action may be as effective a deterrent to an unreasonable search as the use of the exclusionary rule without the objectionable features seen by its critics.[25] Before any such alternative is adopted, some considerable research and compilation of data will be required. Until that data is collected and compiled, these diverging views pose a dilemma for the courts in defining the investigative powers of the administrative agency.

24. Foote, *Tort Remedies in Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

25. For an exhaustive list of arguments for and against the exclusionary rule, *see* the opinion of Judge Traynor, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); *see also* Sloane and Leeds, *A Mapp For the Road Towards Exclusion*, 35 TEMP. L.Q. 27 (1961); Allen, *The Wolf Case*, 45 ILLINOIS L. REV. 1 (1950).

It may be questionable whether a rule that operates primarily after the fact will be effective in preventing unreasonable searches and seizures. However, other available remedies may be inadequate. The injured person may bring an action in tort for trespass, for example. This type of suit is neither an effective deterrent against the continuation of such activity by the agency nor a good method of relief for the individual.[26]

In a situation similar to the one in the instant case, the licensee's complaint that the illegal credit sales slips should not have been confiscated and used to support the license suspension will not hold much appeal for a jury. If the complainant has been adjudged guilty of violating state law, his adversary in the civil action may find means to introduce this evidence to demean the plaintiff's reputation and persuade the jury to accept the search and seizure as being reasonable. Although damages may be awarded, the amount of the judgment and the defendant against whom the judgment is rendered may not accomplish the desired ends of discouraging searches of this kind. Society must ask whether a money award to Finn would really be valuable to the individual licensee and offer future protection to other licensees. Presently, the application of the exclusionary rule to the administrative agency seems to be the best remedy.

The exclusionary rule does not operate only between the defendants and the state. The individual who finally tests the power of the state to search his home, business, or personal effects is really posing as society's advocate, defending the "*collective* right of the people to be free from unreasonable searches and seizures."[27] When the guidelines for reasonable searches worked out in the courts strengthen the protection for the defendant, the rights of every individual in society are secured. The *Finn* decision signals a shift toward the protection of the individual citizen through the court's evaluation of the impact of administrative inspection on fourth amendment rights.

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26. Paulsen, *The Exclusionary Rule and Misconduct By the Police* in POLICE POWER AND INDIVIDUAL FREEDOM 87 (C. Soule ed. 1960).

27. Berman and Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems*, 55 NW. U.L. REV. 525, 537 (1960).