Buffalo Law Review

Volume 20 | Number 3 Article 9

4-1-1971

Criminal Law—Exclusionary Rule Held Not Applicable to Identification Testimony of Known Witness Made Possible by Lead Resulting From Illegal Search in Investigation of Unrelated Crime.

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of immediate, effective, contempt action which the injunction previously enjoyed, the real problem may well lie within the older rule. It may be virtually impossible to enjoin the diverse groups of students, faculty, staff, and street people who may have a part in the campus disorder. Without being able to show a strong bond between those charged with contempt and those actually mentioned in the injunction itself, it is doubtful whether a court could allow them to be brought as defendants into a criminal court action. The university then, may have to handle the campus riot as they would any other criminal act. They may bring the violators to trial in criminal courts, or in the alternative, develop an effective campus judiciary whose final punishment may be suspension or expulsion from the university community.

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CRIMINAL LAW—EXCLUSIONARY RULE HELD NOT APPLICABLE TO IDENTIFICATION TESTIMONY OF KNOWN WITNESS MADE POSSIBLE BY LEAD RESULTING FROM ILLEGAL SEARCH IN INVESTIGATION OF UNRELATED CRIME.

In October, 1967, the Los Angeles Police Department in the course of investigating a series of burglaries obtained a search warrant to enter petitioners' apartment. Among other articles found in the house, a gun was seized.[1] The warrant was thereafter held to be legally insufficient[2] and all items confiscated as a result of the search were deemed inadmissible as evidence against petitioners.[3] The gun's serial number, however, was traced, and it led the police to a robbery victims' report at the Lennox Sheriff's station. The robbery was on the "inactive"[4] file and had not been actively investigated for over two years. The police contacted the robbery victims and showed them photographs of the petitioners whom they identified.

See Katzenbach, *Protest, Politics and the First Amendment*, 44 TUL. L. REV. 439, 440, 449, (1970). Speaking on "governmental" reaction to violent demonstrations for social change, the former United States Attorney General stated:

> What is being tested is the capacity of our political institutions to maintain that essential public confidence which lies at the heart of our democracy, while at the same time coping with the stresses and strains of a very rapidly changing society.

And in conclusion, Mr. Katzenbach suggests:

> . . . [I]f the objective of government is—as it should be—to maintain confidence in its processes, it may often have to go well beyond what is constitutionally required to prove its point.

1. Lockridge v. Superior Court, 3 Cal. 3d 166, 168, 474 P.2d 683, 684, 89 Cal. Rptr. 731, 732 (1970) [hereinafter cited as instant case].

2. *See* Lockridge v. Superior Court, 275 Cal. App. 2d 612, 80 Cal. Rptr. 223 (Ct. App., 2d Dist. 1969).

3. Instant case at 168, 474 P.2d at 684, 89 Cal. Rptr. at 732.

4. A case is "inactive" when all pertinent points have been investigated. Instant case at 168 n.1, 474 P.2d at 685 n.1, 89 Cal. Rptr. at 733 n.1.

Subsequently, petitioners were arrested and charged with robbery. Petitioners moved, pursuant to section 1538.5 of the California Penal Code,[5] to suppress the testimony of the victims, maintaining that it would be inadmissible as "fruit" of an illegal search. The Superior Court of Los Angeles County denied the motion and petitioners then sought a writ of mandate to compel the Superior Court to suppress the victims' testimony. The Supreme Court of California denied the writ by a vote of 4-3. *Held,* where an illegal search warrant is issued and a witness to an unrelated crime becomes available as a result of a lead supplied by the illegal search, his testimony is admissible if he is already known to the police, even though the unrelated crime was on the "inactive" file and there is no evidence that without the lead supplied by the illegal search, the petitioners would have been connected with the crime. *Lockridge v. Superior Court,* 3 Cal. 3d. 166, 474 P.2d 683, 89 Cal. Rptr. 731 (1970).

The fourth amendment guarantee against unreasonable search and seizure[6] has found expression in the exclusion from trial of all evidence which was illegally seized.[7] This rule of exclusion has been accepted in all federal courts since 1914, and has also been deemed to restrict the evidentiary value of "a man's own testimony or of his private papers . . ." when such products were discovered as a result of an illegal search and seizure.[8]

The fourth amendment was made applicable to the states in *Wolf v. Colorado,*[9] but it was not until *Mapp v. Ohio*[10] that the Supreme Court enforced the exclusionary rule upon the states, with the Court holding that the "exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments."[11] The reasons[12] given in *Wolf* for refusing to

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5. CAL. PENAL CODE § 1538.5 (a) (West Cum. Supp. 1971) provides that:
A defendant may move . . . to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on [the grounds that]: . . . (2) the search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant . . . .

6. U.S. CONST. amend. IV guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures. . . ."

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

8. Boyd v. United States, 116 U.S. 616, 630 (1886).

9. 338 U.S. 25 (1949).

10. 367 U.S. 643 (1961).

11. *Id.* at 657.

12. The *Wolf* Court refused to enforce the federal exclusionary rule against the states, since "the ways of enforcing such a basic right raise questions of a different order." Wolf v. Colorado, 338 U.S. 25, 28 (1949). The "questions" referred to in *Wolf* reflected the reservation the Court had about the propriety of forcing a federal rule of evidence upon the states. By applying this rule against the states, the Court in *Wolf* would have had to "brush aside the experience of States which deem the incidence of such conduct [illegal entry] by the police too slight to call for a deterrent remedy. . . ."

enforce the exclusionary rule upon the states were no longer considered to be valid by the *Mapp* court, since the remedies provided by the states to insure the fourth amendment guarantees had proved to be wholly inadequate.[13]

The development of the exclusionary rule led to the restriction of all types of illegally-obtained items from evidence. Although *Mapp* was particularly concerned with the exclusion of real or tangible evidence illegally seized, the exclusionary rule also affected testimonial evidence which was obtained pursuant to an unlawful search and seizure.[14] Federal courts had already held such testimony to be inadmissible, and state courts had no trouble in excluding testimony from evidence which was a direct result of the illegal search. Thus, in *People v. Mickelson*,[15] it was held that where the availability of a witness is a direct result of an illegal search, the witness is no longer competent to testify. Similarly, a witness' testimony was suppressed where police conducted an illegal search of defendant's apartment in hope of finding drugs and instead found the witness.[16]

The exclusionary rule also became applicable to the testimony of a witness who was discovered indirectly through an illegal search and seizure. As early as 1920, the Supreme Court declared in *Silverthorne Lumber Co. v. United States*[17] that all "fruits" of an illegal search were not admissible in a federal court. After *Mapp v. Ohio*, the exclusionary rule applied to state courts with the "same sanction of exclusion as is used against the Federal Government."[18] Thus, a witness' testimony which was a direct or indirect product of an illegal search and seizure could never be used in *any* court. For example, where an illegal search was conducted in a doctor's office, and records, which led police to patients who had received an illegal abortion, were confiscated, the court held the testimony of the patient to be a by-product of the illegal search and therefore not admissible.[19] Likewise, indirect by-products of documents illegally seized have been held

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Id. at 31, 32. In addition, the *Wolf* Court was of the opinion that the states had adequately provided "other means of protection" to insure the right to privacy guaranteed by the fourth amendment. *Id.* at 30.

13. 367 U.S. at 652. *See* Irvine v. California, 347 U.S. 128 (1954), where the Court explores the inadequacy of other remedies.

14. People v. Mikelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963). Testimonial evidence is "intangible" evidence within the meaning of California Penal Code secton 1538.5(a), and may be suppressed. Instant case at 169, 474 P.2d at 685, 89 Cal. Rptr. at 773.

15. 59 Cal. 2d 448, 449, 380 P.2d 658, 659, 30 Cal. Rptr. 18, 19 (1963).

16. People v. Albea, 2 Ill. 2d 317, 118 N.E.2d 277 (1954). For a recent application of the directness approach, see People v. Welborn, 2 Cal. App. 3d 715, 82 Cal. Rptr. 845 (Ct. App., 2d Dist. 1969).

17. 251 U.S. 385 (1920).

18. 367 U.S. 643, 655 (1961).

19. People v. Schaumloffel, 53 Cal. 2d 96, 346 P.2d 393 (1959). *See also* People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1943).

inadmissible as evidence, and "where the bounds of a reasonable search have been exceeded . . . neither the evidence wrongfully seized nor any of its derivatives may be used against defendant."[20] Such derivatives or by-products have become known as the "poisonous fruit" of the illegal search and seizure.[21]

In the instant case, the majority rejected the idea that all facts which are products of an illegal search are "sacred and inaccessible."[22] Since the witnesses were already known to the police as the victims of an unsolved robbery, this, the court argued, was sufficient to remove the "taint" of the poisonous fruit. It was no more than pure "happenstance" that the police came across the gun taken in the robbery while they were investigating an unrelated crime.[23] The witnesses would therefore be allowed to testify because they became known to police through "independent means" and not as a result of an illegal search.[24] To support its holding, the court found an alternative basis for admitting the testimony. The majority pointed out that the illegal search did not lead to the discovery of witnesses "at its scene" who would not otherwise have been known to police, nor did it lead to the victims as "the source of further evidence of the crimes that the police were investigating."[25] Therefore, the testimony of the victims was admissible because they would have been discovered anyway "in the normal course of a lawfully conducted investigation."[26] The majority found that the purpose of the exclusionary rule would not be defeated by allowing the witnesses to testify, since "that purpose was adequately served by suppressing the gun and the evidence of the other crimes that the police were seeking."[27]

Three judges dissented, arguing that the purpose of the exclusionary rule would be defeated by failure to suppress the victims' testimony which was "obtained as a direct, immediate and necessary result of the unlawful seizure of the gun. . . ."[28] By not prohibiting the admissibility of all evidence derived from an illegal search, the dissent feared that there would be a profit and incentive for law officers to disregard the fourth and fourteenth amendments. Thus, the dissent felt that the majority was encouraging the "general search," since the court suppressed those items specifi-

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20. People v. Mills, 148 Cal. App. 2d 392, 399, 306 P.2d 1005, 1012 (Ct. App., 2d Dist. 1957).

21. People v. Superior Court, 3 Cal. App. 3d 476, 483, 83 Cal. Rptr. 771, 776 (Ct. App., 1st Dist. 1970).

22. Instant case at 169, 474 P.2d at 685, 89 Cal. Rptr. at 733.

23. *Id.* at 171, 474 P.2d at 686, 89 Cal. Rptr. at 734.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 173, 474 P.2d at 688, 89 Cal. Rptr. at 736.

cally sought but allowed into evidence the "fruits" of matters not sought.[29] Consequently, argued the dissent, this would have great significance for searches which are conducted without probable cause, since there would always be a chance that the police could find something that would have evidentiary value in an unrelated crime.[30] Where there is probable cause, however, "law enforcement officials will often be deterred from unlawful conduct [for] . . . fear of jeopardizing their right to obtain evidence which could be lawfully seized."[31]

An analysis of the rationale used by the court reveals that the majority incorrectly applied established principles of law. The California Supreme Court "has consistently held that the testimony of a witness who was discovered by the exploitation of illegal police conduct is not admissible."[32] The majority in *Lockridge* admitted the testimony of the witnesses, by applying two established exceptions to the exclusionary rule; (a) that they had become known to police by means independent of the illegal search, or in the alternative, (b) because their testimony "would have been discovered in the normal course of a lawfully conducted investigation."[33] Yet, these exceptions would appear not to be warranted by the factual setting of the instant case. It would be difficult, if not impossible, for the court to rationalize its holding based on the "independent means" test. The majority conceded that "there is no evidence that without the lead supplied by the gun, the police investigation of petitioners would have led them to the robbery report or suggested to them that petitioners might be guilty of the . . . robbery."[34] The "independent means" test is used most frequently with regard to the admissibility of confessions derived from an illegal search and seizure. In *Wong Sun v. United States*,[35] for example, a defendant was illegally arrested, and after being released on his own recognizance, he *voluntarily* returned several days later to make a confession. The Supreme Court said that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint" of the illegal arrest.[36] The standard used by the Court in *Wong Sun* was whether the evidence came about as a result of the "exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged

29. *Id.* at 174, 474 P.2d at 688, 89 Cal. Rptr. at 736.
30. *Id.* at 174, 474 P.2d at 689, 89 Cal. Rptr. at 737.
31. *Id.*
32. *Id.* at 170, 474 P.2d at 685, 89 Cal. Rptr. at 733.
33. *Id.* at 170, 474 P.2d at 686, 89 Cal. Rptr. at 734.
34. *Id.*
35. 371 U.S. 471 (1963).
36. *Id.* at 487, *quoting from* Nardone v. United States, 308 U.S. 338, 341 (1939).

of the primary taint."[37] The Court made it clear, however, that the free will of the defendant was the deciding factor and that all other evidence discovered directly or indirectly as a result of the illegal search would not be admissible, since they were "poisonous fruits" of the illegal police conduct.[38]

It is unclear what the standard would be for the "independent means" test when it is applied outside the area of confessions. Since the Court in *Wong Sun* did not restrict its holding to confessions, any information which was acquired through the "exploitation" of illegal conduct would probably not be admissible. This is not to say that knowledge which is truly gained from an independent source could not be used as evidence, "but the knowledge gained by the Government's own wrong cannot be used by it. . . ."[39]

The cases cited by the majority for support of the "independent means" test would not warrant its application in the instant case. In *State v. O'Bremski,*[40] the police illegally entered defendant's apartment where they found a fifteen year old girl of whom defendant had carnal knowledge. The girl was subsequently allowed to testify against the defendant. This is distinguishable from *Lockridge,* since the police knew the identity of the girl and the defendant's relationship with her *prior* to the illegal search, while in *Lockridge,* the police were ignorant of the connection between the defendant and the robbery victim prior to the illegal entry. The court also cited *People v. Stoner,*[41] where a witness identified the defendant while he was in the custody of an illegal arrest. Although this identification was held inadmissible, a subsequent identification was allowed. The connection between the defendant and the witness was known prior to the illegal arrest and the court explained that "the fruit-of-the-poisonous-tree doctrine has not been invoked when the alleged fruit is testimony of a witness to a crime whose identity was *not* learned through police misconduct."[42] In the instant case, however, the connection between the witness and the defendant *was* learned through police misconduct.

The court in *Lockridge* did not rely solely on the "independent means" test, and rationalized its holding on alternative grounds: namely, that the testimony was admissible because the witness "would have been discovered in the normal course of a lawfully conducted investigation."[43]

37. *Id.* at 488, *quoting from* J. MAGUIRE, EVIDENCE OF GUILT 221 (1959). *See also* United States *ex rel.* Pugach v. Mancusi, 310 F. Supp. 691 (S.D.N.Y. 1970); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); State v. Schneidewind, 47 Wis. 2d 110, 176 N.W.2d 303 (1970).

38. 371 U.S. 471, 486-88 (1963).

39. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

40. 70 Wash. 2d 425, 423 P.2d 530 (1968).

41. 65 Cal. 2d 595, 422 P.2d 585, 55 Cal. Rptr. 897 (1967).

42. *Id.* at 602, 422 P.2d at 589, 55 Cal. Rptr. at 901.

43. Instant case at 170, 474 P.2d at 686, 89 Cal. Rptr. at 734.

This recognized exception to the exclusionary rule allows testimony to be admitted if the prosecution can prove that the information so gained "has not 'led,' directly or indirectly, to the discovery" of any testimony which is introduced into evidence.[44] The standard for the "sine qua non"[45] test is that if the testimony *"would* have been discovered, even if the unlawful act had never taken place," then it is admissible.[46] The prosecution must show "that it *would* have obtained the otherwise tainted evidence even if the unlawful act had not occurred."[47] In the instant case, it is improbable that the prosecution could show that it *would* have discovered the connection between the witnesses and the defendants, since the robbery case was on the "inactive" file and had not been actively investigated for over two years.[48] It is simply not enough that the police had a report of the robbery and that they *could* have or *might* have associated the robbery with the defendants.[49] Furthermore, the state must show that it "has not in fact benefitted from the wrongful act, which can be done only by a showing that discovery of the proffered evidence was inevitable."[50] A showing of this is highly unlikely, considering that the robbery case was "inactive" and that the police were investigating petitioners for a totally unrelated crime.

The majority's strained application of the "independent means" and the "sine qua non" tests to the factual setting of the case indicates that there may have been underlying considerations not manifest in the majority opinion that guided the court to its holding. After disposing of the majority's contention that the case can be rationalized on established principles of law, the dissent goes to great lengths to point out that the exclusionary rule is a necessary enforcement of constitutional guarantees "even though some criminals should escape."[51] The majority may have been aware that if the defendants were successfully allowed to invoke the exclusionary rule, they probably never could be arrested for the robbery since it would be difficult to prove that the lead supplied by the gun was

44. United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950).

45. Maguire, *How To Unpoison The Fruit—The Fourth Amendment And The Exclusionary Rule,* 55 J. CRIM. L.C. & P.S. 307, 313-14 (1964).

46. *Id.* at 314.

47. *Id.* at 315.

48. Instant case at 168, 474 P.2d at 685, 89 Cal. Rptr. at 733.

49. Maguire, *supra* note 45, at 315. The purpose of the exclusionary rule is to exclude all evidence that *"would* not have been found, if officials had not violated the laws designed to deny them access to it." United States v. Coplon, 185 F.2d 629, 640 (2d Cir. 1950) (emphasis added). For a somewhat different opinion on the admissibility of evidence that "would" have been discovered anyway, *see* United States v. Schipani, 414 F.2d 1262, 1266 (2d Cir. 1969).

50. Maguire, *supra* note 45, at 316.

51. Instant case at 173, 474 P.2d at 688, 89 Cal. Rptr. at 736, *quoting from* People v. Cahan, 44 Cal. 2d 434, 438-39, 282 P.2d 905, 907 (1955).

not the basis for their arrest. If the court was aware of this, as the dissent tacitly implies, then the majority was essentially making a policy choice. The fact remains, however, that the policy choice that created the exclusionary rule "was [already] made"[52] and any arguments against it "should be addressed to the question [of] whether [the rule] should exist at all."[53] A fear that the defendant will never be punished for his criminal acts will not "justify a failure to enforce [the rule] while [it] remains the law of the land."[54]

It is becoming evident, however, that such policy choices are often made by courts. In *Hollingsworth v. United States*,[55] the United States Court of Appeals said:

> The steady increase in the number of serious crimes throughout the United States is a matter of grave concern. Of course, the constitutional rights of the individual should be protected. But in our zeal to safeguard those rights, we *must* not be unmindful of the public interest involved and we should not erect any *unnecessary barriers* that will thwart the law enforcement officers in the performance of their duties to investigate, detect and secure evidence of crime.

Similarly, in *Payne v. United States*,[56] the court was horrified at the possibility of allowing the defendant to invoke the exclusionary rule, since the majority feared that, "the consequence of accepting appellant's contention in the present situation would be that [the witness] would be forever precluded from testifying against [the defendant] in court . . . ."[57]

If the exclusionary rule is to be an effective safeguard of the constitutional rights guaranteed by the fourth and fourteenth amendments, then "violations of procedural rights must occasion reversal, irrespective of actual guilt."[58] When a defendant raises a fourth amendment argument, courts are not solely concerned with the rights of the individual defendant but rather with the "constitutional right of all of the people to be secure in their homes, persons and effects."[59] It must be remembered that allowing guilty defendants to go free "is a regrettable by-product of the rule and not its objective."[60]

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52. Instant case at 173, 474 P.2d at 687, 89 Cal. Rptr. at 735, *quoting from* People v. Cahan, 44 Cal. 2d 434, 438, 282 P.2d 905, 907 (1955).
53. People v. Cahan, 44 Cal. 2d 434, 450, 282 P.2d 905, 914 (1955).
54. *Id.*
55. 321 F.2d 342, 353 (10th Cir. 1963) (emphasis added).
56. 294 F.2d 723 (D.C. Cir.), *cert. denied*, 368 U.S. 883 (1961).
57. *Id.* at 727.
58. Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DE PAUL L. REV. 80, 95 (1969).
59. People v. Cahan, 44 Cal. 2d 434, 439, 282 P.2d 905, 907 (1955).
60. Maguire, *supra* note 45, at 308.

The arguments proposed by the dissent, that the holding of *Lockridge* would encourage a "general search" and provide an incentive for law enforcement officials to violate an individual's constitutional rights, clearly reflect the long-standing rationale of the exclusionary rule. The underlying effect of the holding in *Lockridge,* however, is to restrict the exclusionary rule and allow courts to engage in making policy choices even though the binding choices of policy have already been made by the United States Supreme Court in *Weeks v. United States*[61] and *Mapp v. Ohio.*[62] The driving force of *Mapp v. Ohio,*[63] was a "belief of the majority in the utter emptiness of the right assimilated by due process in *Wolf* without the remedy of exclusion."[64] When a state court is free to make a policy choice and thereby restrict the exclusionary rule, the remedy becomes almost non-existent.

HOWARD J. LEVINE

CRIMINAL LAW—VOLUNTARY ADMISSIONS HELD ADMISSIBLE EVEN THOUGH OBTAINED BY MEANS OF INTERROGATION IN ABSENCE OF COUNSEL.

In January, 1965, the defendant was arrested for murder and taken to the police station where he was permitted to confer with his attorney. When the attorney left the room, indicating to the detective on duty to "watch" the defendant while he went some place in the building, the detective asked defendant, "[D]id you ever think it would wind up like this?"[1] The defendant replied affirmatively and commenced to describe the crime in detail. The incriminating admissions were allowed into evidence at trial. The defendant was convicted in New York County Supreme Court of first degree murder and sentenced to life imprisonment. The defendant moved on appeal for reversal and a new trial on the grounds that once an attorney has entered a criminal proceeding, admissions made in his absence constitute a denial of the right to counsel and are therefore inadmissible. The conviction was affirmed by the appellate division.[2] The New York Court of Appeals affirmed in a five to two decision. *Held,* voluntary admissions made to a police officer are not inadmissible merely because they were made in response to questioning in the absence of defendant's counsel. *People v. Robles,* 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970).

61. 232 U.S. 383 (1914).
62. 367 U.S. 643 (1961).
63. *Id.*
64. Wolf, *A Survey of the Expanded Exclusionary Rule,* 32 GEO. WASH. L. REV. 193, 212 (1963).

1. People v. Robles, 27 N.Y.2d 155, 158, 263 N.E.2d 304, 305, 314 N.Y.S.2d 793, 794 (1970).
2. People v Robles, 32 App. Div. 2d 741, 300 N.Y.S.2d 510 (1st Dep't 1969).