Buffalo Law Review

Volume 12 | Number 1 Article 24

10-1-1962

Criminal Law And Procedure—Application of the Exclusionary Rule to New York Trials Before Mapp v. Ohio

Roger V. Barth

CRIMINAL LAW AND PROCEDURE

APPLICATION OF THE EXCLUSIONARY RULE TO NEW YORK TRIALS BEFORE MAPP V. OHIO

During the 1961 Court of Appeals term several decisions were handed down relating to the admissibility of illegally seized evidence in state criminal prosecutions. These decisions were prompted by *Mapp v. Ohio*,[1] in which the Supreme Court held that evidence obtained by illegal search and seizure was inadmissible in *state* courts as well as federal. The Court of Appeals has been presented with the question of whether *Mapp* will be applied to pre-*Mapp* trials, and if so, to which ones. The approach of the Court has been to give a restrictive effect to *Mapp*. Although the problem of retroactivity is an unsettled one, it is the contention of this writer that the narrow lines drawn as to when *Mapp* will apply are both unjust and illogical.

The United States Supreme Court in *Weeks v. United States*,[2] ruled that evidence illegally obtained by a Federal Marshal was inadmissible in a federal court. It was held that the Fourth Amendment prohibited illegal searches and seizures, and federal courts are required not to lend support to such action by admitting evidence so found. Then, in 1949, the Supreme Court in *Wolf v. Colorado*[3] held that evidence illegally obtained was not *in*admissible in state courts. The requirements of the Fourth Amendment, as applicable to the states by the "due process clause" do not dictate exclusion; it is for the states to decide how they will enforce the right to privacy. The Supreme Court has chosen exclusion in federal courts to deter federal violation, but the states may choose their own methods. But, on June 19, 1961, the Court overruled *Wolf v. Colorado*, holding that the exclusionary rule *is* an essential part of both the Fourth and Fourteenth Amendments and must apply to state courts.[4] Unfortunately, yet perhaps expectedly, the Court made no definitive statement as to the retrospective or prospective effect to be given the decision. However, in a footnote it implied that the effect may be retrospective.[5]

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1. 367 U.S. 643 (1961).
2. 232 U.S. 383 (1914).
3. 338 U.S. 25.
4. Mapp, supra note 1.
5. The Court in Mapp, supra note 1, at 659, said:
There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '(t)he criminal is to go free because the constable has blundered.' People v. Defore, 242 N.Y. at 21, 150 N.E. at 587. In some cases this will undoubtedly be the result.
Then in footnote 9, supra note 1, at 659, the Court continued:
As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with Burns v. Ohio, 360 U.S. 252, Griffin v. Illinois, 351 U.S. 12, and Herman v. Claudy, 350 U.S. 116. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

The first *Mapp* case to reach the Court of Appeals was *People v. Loria,* 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (Nov. 30 1961). Defendant was convicted of narcotics violations by illegally seized evidence in January, 1961. His conviction was affirmed by the Appellate Division on June 13, 1961, six days before *Mapp.* The Court of Appeals held "that the Mapp rule is to be applied in our review of pending appeals from pre-*Mapp* convictions." Effect was given to the "general rule" that the Court apply the law as it exists at the time of its decision. The Court reversed the conviction upon the condition that the State be allowed an opportunity to prove the legality of the search.

On April 5, 1962, four *Mapp*-related cases were decided which, taken together, may bewilder both laymen and practitioners. In *People v. Coffey,* 11 N.Y.2d 142, 182 N.E.2d 92, 227 N.Y.S.2d 412, an Appellate Division affirmance of conviction on questionable evidence had been rendered. The argument occurred before June 19, but the affirmance was given after *Mapp.* The Court of Appeals withheld determination but ordered the Court of Special Sessions to determine specially the legality of the search and seizure involved. The Court of Appeals made two major points. First, on the basis of *Loria,* the Court would apply *Mapp* to appeals reaching it in ordinary course even though the trial occurred before June 19th. Second, it found that defendant had sufficiently protested the use of the questionable evidence to the trial court so as to preserve the issue for review.

The District Attorney conceded in *People v. O'Neill,* 11 N.Y.2d 148, 182 N.E.2d 95, 227 N.Y.S.2d 416 (1962), that the search and seizure of evidence on which defendant was convicted was unlawful, but contended that the Court could not review the question since no objection was made at the pre-*Mapp* trial. In reversing the conviction and dismissing the information, the Court of Appeals found that defendant's counsel had made general objections and had asked the police officer "under what law" did he enter the house without "making an arrest and without a warrant." These objections were sufficient although no specific constitutional grounds were stated.

Defendant in *People v. Muller,* 11 N.Y.2d 154, 182 N.E.2d 99, 227 N.Y.S.2d 421 (1962), was convicted of narcotics possession in 1953 on evidence now questionable. The Appellate Division affirmed in October 1954. Leave to appeal was denied on November 8, 1954; reargument of the motion for leave was denied in December 1955, January 1956, and November 1961. Leave was finally granted to consider the applicability of *Mapp v. Ohio.* Affirming the judgment, the Court distinguished *Loria, supra,* which arose in the normal course of appeal. Here, the appellate process was completed on November 8, 1954. Since no appeal could be said to be pending on June 19, 1961, *Mapp* would not apply.

The fourth of these cases decided on April 5, 1962, was *People v. Friola,* 11 N.Y.2d 157, 182 N.E.2d 100, 227 N.Y.S.2d 423. No objection was made to the evidence presented at the pre-June 19 trial. The Court held that "no

question of law has been preserved for our review."[6] There was no inquiry or protest which met the statutory standard[7] for saving issues for review.

The final *Mapp* case of the term, *People v. Yarmosh,* 11 N.Y.2d 397, 184 N.E.2d 165, 230 N.Y.S.2d 185 (1962), reversed a conviction on the strength of *O'Neill, supra,* and *Friola, supra.* Defense counsel established that there was no search warrant, and questioned an officer regarding defendants' constitutional rights.

It is interesting to note that the only dissent in all these cases was that of Chief Judge Desmond and Judge Fuld in *Friola.* There the Chief Judge carefully pointed out the weakness of requiring an objection at trial. At trials before *Mapp,* there was no basis, either statutory or constitutional, for such objection. Reasonably, defense counsel would hesitate to raise a then pointless objection for fear of antagonizing judge and jury. Thus, the Court is now rewarding defendants who had the good fortune to be represented by a lawyer who was either careless or possessed of a crystal ball. At the same time, the line drawn favoring a defendant having an appeal pending on June 19, 1961, over one whose appeal was decided June 16 (June 19 being a Monday) is slim indeed. The Court of Appeals has done its best to limit the applicability of the Supreme Court ruling. But was this goal proper? Undoubtedly many appeals from prisoners tried long ago would be presented if broader scope were given the *Mapp* holding. Also, many may believe society should be protected from these criminals convicted before *Mapp.* But where individual freedom and the integrity of the system of law are at stake, administrative inconvenience should not be a bar. Then, too, maintenance of respect for constitutionally protected rights ought to be worth the price of freeing some convicts. Although the Supreme Court itself has not yet decided *Mapp* retroactively, it has shown little apprehension over the asserted fear of prison gates being thrown open. In 1956 it held that a state must, under the Federal Constitution, grant indigent prisoners adequate appellate review including free transcripts to submit for review.[8] Then, two years later, it reversed a state court denial of habeas corpus to a prisoner convicted and denied a free transcript in *1935.*[9]

The task of the Court of Appeals, like that of all responsible bodies, is often a thankless one. On such an unclear yet controversial problem,[10] the Court would be criticized whichever tack it took. But arguments of State reliance upon *Wolf v. Colorado,* or of the need to protect society, lose their impact when countered by considerations of judicial integrity, fairness, and a dislike for arbitrariness and "luck" in the administration of justice.

R. V. B.

6. 11 N.Y.2d at 159, 182 N.E.2d at 101, 227 N.Y.S.2d at 423-24.
7. N.Y. Code Crim. Proc. § 420-a.
8. Griffin v. Illinois, 351 U.S. 12.
9. Eskridge v. Washington State Board, 357 U.S. 214 (1958).
10. Bender, Retroactive Effect of an Overruling Constitutional Decision, 110 U. Pa L. Rev. 650 (1962); Torcia and King, Mirage of Retroactivity and Changing Constitutional Concepts, 66 Dick. L. Rev. 269 (1962).