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Suppression Prior to Indictment of Confessions Unconstitutionally Obtained

Allan F. Conwill

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Thomas S. Chuhak
Lloyd A. Van Deusen } *Criminal Law Editors*

Suppression Prior to Indictment of Confessions Unconstitutionally Obtained

Another protective measure has been established regarding confessions in federal cases. In the recent case of *In re Fried,* a circuit court of appeal held that a confession obtained in violation of constitutional provisions may be suppressed by an independent proceeding in equity *prior to indictment or any other criminal court proceeding.*[1] The petitioners in this instance were seized by federal officers on suspicion of stealing a carload of rubber bound for overseas shipment by the Reconstruction Finance Corporation. They were taken into immediate custody without arraignment and without being permitted to call attorneys. After alleged extended periods of abusive grilling, they signed confessions. Subsequently, though no indictment had been returned, they petitioned in equity for suppression of the confessions and for return of documentary evidence seized at the time of their arrest. The court refused to consider any evidence with regard to the alleged illegality of the confessions.[2] The Circuit Court of Appeals reversed the decision, but not without a forceful dissent by one judge who was unwilling to deviate from the prevailing practice of waiting until actual trial to consider the validity of confessions.[3]

The significance of the decision is not concerned with the vexing problem which so frequently has troubled courts in the past; that is, under what circumstances are one's constitutional or statutory rights violated?[4] Instead, the principal question is confined to a determination of what point in judicial proceedings can an unconstitutionally obtained confession be forever suppressed for evidential purposes.[5]

Apparently this is the first case, state or federal, to hold that such confessions may be suppressed before any criminal proceedings are commenced, or even after indictment but before trial. Though the factual situation arises rarely, one federal case allowed suppression where the

1 In re Fried, 161 F. (2d) 453 (C.C.A. 2d, 1947) (Certiorari granted: 331 U. S. 804). A substantial part of the opinion dealt with evidence of alleged illegality of the documentary seizure. The ensuing discussion does not deal with this aspect of the case. Each of the three judges took a different view of the case, one wishing to suppress all confessions secured in violation of either the statutory or constitutional rights of the accused. Another wished to extend it only to violations of constitutional rights; this composed the majority decision. The third was unwilling to make any extension of the prevailing doctrine because he feared undue obstruction of public prosecutions.

2 68 F. Supp. 961 (S.D.N.Y., 1946).

3 People v. Reed, 333 Ill. 397, 164 N.E. 847 at 851 (1928).

4 McNabb et al. v. U.S., 318 U. S. 332 (1942); Note (1947) 38 J. Crim L. & Criminology 136.

5 The United States Supreme Court is to consider that question also, since certiorari has been granted in the Fried case, 331 U.S. 804 (1947).

question of timeliness of the attempt to suppress was not raised.[6] In another case where the question was squarely before the court on an equivalent set of facts, the result reached was directly opposite the one in the instant case.[7] Several state courts have denied such relief when requested after indictment but before trial.[8] Normally (where no indictment had been returned) these suits arise by a petition in equity for a perpetual injunction against the public prosecutor from using the confession or any information gained thereunder in any criminal action involving the petitioner.[9] If an indictment is pending, the procedure is usually by preliminary motion to suppress before the trial court.[10] The reasons for denying these motions and petitions have been twofold: that equity has no jurisdiction to stay, meddle in or impede criminal proceedings, and that the trial court, where the complete situation will be presented, is the only place where a fair decision may be made as to whether the rights of the accused were violated.[11]

Essentially the same questions arise in proceedings for the preliminary suppression and return of tangible evidence such as documents, books, materials or equipment which are illegally seized. As with confession cases, these suits arise upon an equity petition, where no indictment has been returned, or by a preliminary motion in advance of trial if an indictment is pending.[12] The prevailing practice here (in jurisdictions following the federal view of inadmissibility of illegally seized evidence) is that tangible objects may be suppressed as evidence and returned regardless of whether an indictment is pending,[13] though there is still an

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6 U. S. v. Pollack, 64 F. Supp. 554 (C.D.N.J., 1946) (Motion for suppression of tangible evidence and written statements made after indictment but before trial; granted, but specific question of timeliness with respect to the statements not raised.)

7 Eastus v. Bradshaw, 94 F. (2d) 788 (C.C.A. 5th, 1938). (Bill in equity against U.S. District Attorney and Special Agent of U. S. Revenue Service for decree enjoining respondents from using as evidence the sworn testimony delivered by petitioner to the agent during certain income tax investigations. No indictment was pending.) *Cert denied*, 304 U.S. 576 (1938).

8 Kokenes v. State, 213 Ind 476, 13 N.E. (2d) 524 (1938); People v. Reed, 333 Ill. 397, 164 N.E. 847 (1928); People v. Nentarz, 142 Misc. 477, 254 N.Y.S. 574 (1931).

9 Eastus v. Bradshaw, 94 F. (2d) 788 (C.C.A. 5th, 1938).

10 People v. Reed, 333 Ill. 397, 164 N.E. 847 (1928).

11 As to the denial of equitable jurisdiction: Eastus v. Bradshaw, 94 F. (2d) 788 (C.C.A. 5th, 1938); as to determination before the trial court: U. S. v. Lydecker, 275 F. 976 at 978 (W.D.N.Y., 1921).

12 Go-Bart Co. v. U. S., 282 U. S. 344 (1931).

13 The Supreme Court first discarded the Common Law rule that evidence is not rendered inadmissible because of being unlawfully obtained in Boyd v. U. S., 116 U. S. 616 at 638 (1886). This new doctrine received a temporary setback in Adams v. New York, 192 U. S. 585 (1904) which reaffirmed the Common Law Rule and confined the Boyd case to its facts. Later, however, the court approved the method of obtaining a federal court order for the return of illegally seized evidence before trial, Weeks v. U. S., 232 U. S. 383 (1914), and this procedure has been accepted generally ever since. Goodman v. Lane, 48 F. (2d) 32 (C.C.A. 8th, 1931); Bucari et al v. Fili, 31 F. Supp 433 (M.D. Pa., 1940). Accord, where power to suppress before indictment recognized: Burdeau v. McDowell, 256 U. S. 465 (1921); Perlman v. U. S., 247 U. S. 7 (1918); Foley v. U. S., 64 F. (2d) 1 (C.C.A. 5th, 1933); Milburne v. U. S., 77 F. (2d) 310 (C.C.A. 2d, 1935); U. S. v. Maresca, 266 F. 713 (S.D.N.Y., 1920)

occasional case to the contrary.[14]

The inconsistency of the rules as to tangible and intangible (confession) evidence up to the instant case is apparent. There would seem to be no distinction in the nature of the evidence which would justify pre-indictment suppression in the one type of case and not in the other, although at least one court has attempted to explain away the inconsistency on this basis.[15] Historically, however, there has been a difference in the development of the doctrines by which these types of evidence are rendered inadmissible.[16] The rule against admission of tangible evidence obtained through illegal search and seizure seems to spring from a supposed overlap of the Fourth and Fifth Amendments;[17] that is, since the Fourth Amendment forbids illegal search and seizure, the use of evidence thereby obtained is (according to an interpretation which has been criticized as historically incorrect[18]) self-incriminatory within the meaning of the Fifth Amendment.[19] On the other hand, the rule against involuntary confessions is older and springs from different considerations. At common law, as well as upon due process considerations, confessions obtained through the use of force or inducement were regarded to be so untrustworthy that they were excluded as incompetent.[20] Thus Wigmore, along with a majority of the authorities, condemns the use of voluntariness alone as the test of a confession's admissibility as both historically incorrect and inadequate. He rejects the view that there is an association between the confession rule and the privilege against self-incrimination, and points out the fact that in point of time the origin of the confession rule and the privilege are widely separated.[21] On the other hand, Dean McCormick and others find a kinship between the confession rule and the privilege against self-incrimination. They see in the test of voluntariness an indication that the rules restricting the use of confessions are prompted by a desire to protect the subject against torture, as well as by a desire to safeguard the trustworthiness of the evidence.[22] But whatever the answer may be to this spirited conflict, it is sufficient for the purpose here to note briefly that as to historical development, the confession rule has been different in both point of time and substance than the rule as to illegal searches and seizures.

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14 Imperiale v. Perkins, 66 F. (2d) 805 (Ct. Ap. D. C., 1933). (Where alien filed petition against Labor Department for suppression of evidence illegally seized; distinguishable since district court has no jurisdiction over administrative agencies during pendency of proceedings there.) U. S. v. Gruber, ... F. (2d) ... (S.D.N.Y., 1947). (Evidence obtained by wire tapping not excluded before indictment because no way to determine whether prosecutor intended to use same in criminal proceedings.)

15 Eastus v. Bradshaw, 94 F. (2d) 788 (C.C.A. 5th, 1938).

16 *See* 3 Wigmore, Evidence §817-823; 8 Wigmore, Evidence §2183 (3rd. Ed, 1940).

17 U. S. Const. Amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . . " U. S. Const. Amend. V: " . . . nor shall (persons) be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty . . . without due process of law."

18 Note (1947) 37 J. Crim. L. & Criminology 417, 418.

19 Gouled v. U. S., 255 U. S. 298 (1921); Note (1947) 38 J. Crim. L. & Criminology 136.

20 People v. McMahon, 15 N. Y. 386 (1857).

21 See 3 Wigmore, Evidence (1940) §§823-827; 2266.

22 See McCormick, C. T., "The Scope of Privilege in the Law of Evidence" (1938) 16 Texas L. Rev. 447 at pp. 452-457. See also McCormick, C. T., "Some Problems and Developments in the Admissibility of Confessions" (1946) 24 Texas L. Rev. 239.

The difference in historical development, however, is not persuasive as justifying present day inconsistency in the two doctrines of admissibility. Whether confessions are excluded because of untrustworthiness or violation of constitutional rights, the point is that they will be excluded. The issue is, therefore, should involuntary confessions be excluded prior to indictment as tangible evidence is, or should the test of their validity wait for determination at the actual trial?

Arguments against pre-indictment suppression of tangible evidence have been nearly identical with those used against confessions. As previously stated, in tangible evidence cases equitable jurisdiction has been questioned;[23] the view that prosecutions might be impeded seriously has been submitted;[24] and it has been stated that the trial court is the best place to make a fair determination of the issue.[25] These arguments were overcome, however, and now even the Federal Rules of Criminal Procedure provide for motions in advance of trial for the return of books, papers, and other tangible objects unlawfully seized and for the suppression of their use as evidence.[26] Moreover, if the defendant fails to make a pre-trial motion his objection is considered waived,[27] unless, of course, he was unaware of the illegality of the seizure.[28] The federal rules, however, make no provision for pre-trial suppression of unlawfully obtained confessions.

Since there seems to be no justification, in legal principle, for allowing the pre-indictment or pre-trial suppression of tangible evidence while at the same time disallowing similar motions regarding confessions, are there sufficient practical reasons for sustaining a rule making a motion to suppress an unconstitutionally obtained confession depend upon whether an indictment has been returned or upon whether the trial is in progress?

The strongest argument against suppression is that prosecution of public offenders will be hampered. This is undeniable, for there can be little doubt that dilatory motions will be increased by such a rule and that prosecutors will have the burden of defending their activities in separate and additional proceedings. It is not unanswerable, however, for we may point to the existence of the tangible evidence rule for several years which has meant increased dilatory motions and additional burdens to prosecutions. Yet the prosecutors seem to function effectively, which would seem to indicate that the extension here in question would not add an unbearable burden. Moreover, because there are far more searches and seizures than there are guilty or innocent persons who confess, the use of this doctrine is probably more widespread than would be a similar doctrine applied to confessions. Furthermore, if the principal basis of a prosecution is a confession, perhaps some prosecutors would welcome an opportunity to test its validity in advance. A pre-indictment determination of invalidity might well save a great amount of time in preparing a case for indictment and trial. It may indicate to the prose-

23 Bucari v. Fili, 31 F. Supp. 433 (M. D. Pa., 1940).
24 Goodman v. Lane, 48 F. (2d) 32 (C.C.A. 8th, 1931).
25 Weeks v. U. S., 232 U. S. 383 (1914).
26 Rule 41 (e) of the Rules of Criminal Procedure for the District Courts of the United States, 18 U.S.C.A. §687 (Supp. 1947).
27 Segurola v. U. S., 275 U. S. 106 (1927); Durkin v. U. S., 62 F. (2d) 305 (C.C.A. 1st, 1933). *Contra*: Samson v. U. S., 26 F. (2d) 769 (C.C.A. 1st, 1928). (Motion made immediately after jury sworn in not too late.)
28 Agnello v. U. S., 269 U. S. 20 (1925); Gouled v. U. S., 255 U. S. 298 (1921).

cutor that it is futile to continue the case, thus saving a tremendous amount of work, or show him that he must find other substantial evidence in order that his case may stand.

As to the argument that the trial court is the best place to make an accurate determination, this would be a material factor only if the preliminary proceeding is of a most summary nature. There seems to be no reason why an effective presentation of all the facts and circumstances necessary for a fair decision cannot be made in a preliminary proceeding. Assuming that more time will be required, especially if the court follows Wigmore's theory of excluding confessions only if they are untrustworthy,[29] for this necessitates an exhaustive presentation of the pertinent circumstances as well as collateral matters, the preliminary proceeding nevertheless has the advantage of evidence freshness which may mean a more accurate picture of all conditions. And if the primary interest is full protection to the accused, the additional time argument is not entitled to persuasive weight.

As to the equitable power argument, the law is now settled that equity may stay a criminal prosecution.[30] Even if this were not true, pre-indictment suppression in federal courts could be obtained through use of the Supreme Court's supervisory powers over the administration of justice in the inferior federal courts.[31]

The great advantage of pre-indictment suppression of involuntary confessions is the protection of the individual. That a wrongful indictment works a tremendous hardship on an individual hardly can be denied.[32] Even though he be exonerated completely at a later date, his reputation has suffered, he has the burden of a time consuming defense, and some of the stigma will remain. Another possible advantage to the general public would be the imposition of more civilized standards of conduct on federal police officers. This apparently has been an objective of the Supreme Court in its recent holdings rejecting involuntary confessions,[33] though the effect of these decisions on the individual police officer has been discounted.[34] But even a slight improvement is a step in the right direction. Furthermore, federal criminal procedure will be clarified by doctrinal consistency. Of course, consistency could be worked in reverse by overruling the doctrine that tangible evidence may be sup-

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29 State v. Schabert, 218 Minn. 1, 15 NW (2d) 585 (1944).

30 The dissenting judge in the instant case readily acknowledged that tangible evidence may be suppressed by independent equity proceeding prior to indictment, 161 F. (2d) 453 at 466 (C.C.A. 2d, 1947), as well as the fact that it would be logically consistent to extend that rule to confessions illegally obtained. He felt, however, that practical considerations (impediment to prosecutions) were more important than logical consistency.

31 McNabb v. U. S., 318 U. S. 332 (1942).

32 *See* Judge Frank's persuasive opinion in instant case, 161 F. (2d) 453 (C.C.A. 2d, 1947) at pp. 459 & 465.

33 McNabb v. U. S., 318 U. S. 332 (1942). And U. S. v. Mitchell, 322 U. S. 65 (1944) which limited the broad rule expressed in the McNabb case to situations in which the illegal detention of the accused itself acts as an inducement in the procuring of the confession, in which case the confession probably would be untrustworthy. Ashcraft v. Tennessee, 322 U. S. 143 (1944). (*See* Mr. Justice Frankfurter's concurring opinion.)

34 Warner, "How Can The Third Degree Be Eliminated," (1940), 1 Bill of Rights Review 24. (Abstention from "third degree" methods depends on police ability to protect society without them.)