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Police Science Legal Abstracts and Notes

POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

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Failure to Take Federal Prisoners Before Commissioner for Preliminary Hearing Nullifies any Confession Obtained During Period of Unreasonable Delay (The McNabb Case Rule Restated)—Until the recent United States Supreme Court decision in *Upshaw v. United States,* 69 S. Ct. 170 (December 13, 1948), there was considerable uncertainty as to the full effect upon the admissibility of confessions in federal cases of a failure on the part of federal officers to take arrested persons without unreasonable delay before the nearest available committing magistrate. The language the Supreme Court used in the earlier case of *McNabb v. United States,* 318 U.S. 332 (1943), which laid down the so-called "civilized standards" rule for federal criminal interrogators, seemed to indicate, or at least was so interpreted by a number of lower federal courts, that whenever federal officers failed to comply with a statutory mandate regarding early arraignment, any confession obtained by them was inadmissible in evidence. In a subsequent United States Supreme Court case, *United States v. Mitchell,* 322 U.S. 65 (1944), the Court held that a confession which preceded the unreasonable delay was unaffected by the subsequent illegal action of the federal officers. In that case the Court seemed to lay dawn a qualification to the original *McNabb* case rule to the effect that the mere fact of delay alone was insufficient to nullify a confession, but that the delay must have had an "inducing effect" on the confession. The one justice who dissented in the *McNabb* case considered as very desirable the *Mitchell* case language qualification of the original and seemingly much more rigid *McNabb* case rule. In any event, the *Mitchell* case qualifying language gave rise to considerable uncertainty as to just how much 'inducing effect' was necessary to affect the validity of a confession.

In the recent *Upshaw* case, the Court was faced with somewhat of a dilemma. If the Court really meant what it seemed to say in the *McNabb* case, a reversal of the *Upshaw* case conviction was in order. On the other hand, if the qualifying language the Court used in the *Mitchell* case was to be accorded any significance apart from its application to the particular facts of that case, then the Court could find a basis for upholding the conviction in the *Upshaw* case. That dilemma has now been dispelled, for in its latest decision in the *Upshaw* case, the United States Supreme Court has announced that it meant just what was said in the *McNabb* case. In other words, as the law now stands, if federal officers do not comply with Rule 5 (a) of the Federal Rules and Criminal Procedure, which requires that an officer making an arrest "shall take the arrested person without unnecessary delay before the nearest available committing magistrate," any confession obtained thereafter, however voluntary it might otherwise be, is inadmissible. (For a discussion of this general problem and particularly for a discussion of the policeman's side of this whole issue, see Inbau, "The Confession Dilemma in the United States Supreme Court" (1948) 43 Ill. L. Rev. 442.)

United States Supreme Court Decision on Search and Seizure in Gambling Case—Suspecting, on the basis of a previous record, that the

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petitioner, McDonald, was carrying on a numbers game in a rented room in the District of Columbia, three police officers surrounded the rooming house. Hearing an adding machine inside (commonly used in numbers operations), one of the officers, without having obtained a search or arrest warrant, climbed through a window, identified himself to the landlady, and proceeded to admit the other officers. On looking over the transom of McDonald's room, the officers saw him with numbers' slips, money, and adding machines. On command, McDonald opened the door and was arrested, the search and seizure following. He appealed from a conviction in the District Court, alleging that the court had erred in overruling his motion to suppress the evidence on the ground of illegal search and seizure.

In holding that the Fourth Amendment of the United States Constitution prevented the introduction of such evidence, *McDonald* v. *United States,* 69 S. Ct. 191 (1948), the Supreme Court based its decision on three factors in the case: 1) there was no emergency which warranted immediate action, since the petitioner had been under surveillance for several months; 2) the view through the transom would have afforded probable cause for the issuance of the necessary warrants had the officers taken the trouble to apply; and 3) there was no fear of the prisoners fleeing or destroying their equipment since they were operating in ignorance of the proximity of the police officers.

In a special concurring opinion, Mr. Justice Jackson supported the decision on the grounds that the original entry was illegal, and hence all of the subsequent acts, including the seizure, were illegal. The dissent, dismissing the illegal entry theory on the grounds that since McDonald was merely a tenant there was no illegal entry with respect to him, claimed the view over the transom justified the arrest of which the search was a lawful incident. This argument rested on the transitory and intermittent nature of numbers game operations. See Comments in (1947) 37 J. Crim. L. & Criminology 413, and (1948) 38 J. Crim. L. & Criminology 629 for a discussion of the rule against unreasonable searches and seizures.)

Positive Identification of Fingerprint by Expert Not Improper Testimony of Ultimate Fact—In *State v. Viola,* 82 N.E. (2d) 306 (Ohio, 1948), an F.B.I. fingerprint expert was allowed to testify that a latent print found on a glass in the barroom where the murder occurred was left by the defendant, ". . . and no one else's finger made the impression or could have made it." As the defense was alibi, it was objected that this was testimony of an ultimate fact—the defendant's presence at the site of the crime—and hence invaded the province of the jury. On appeal the Court of Appeals of Ohio in affirming the conviction stated that it was clear to them that the witness was merely stating his opinion and not testifying on the ultimate issue of guilt or innocence of defendant. It also ruled as not prejudicial the assertion by the witness that the Federal Bureau of Investigation "in my opinion is recognized as being the world's authority in prints," in view of the fact that he had spent more than fourteen years with the organization.

Privilege for Communications by Informers to Police—In the case discussed above, *State v. Viola,* the Ohio Court of Appeals was also asked to reverse the conviction because the trial judge had refused to compel

a police sergeant to divulge upon cross-examination by defendant's counsel the name of his informant whose information led to defendant's apprehension. The court upheld this ruling, saying: "To compel the arresting authority to divulge the source of its information would tend to cause persons possessing valuable information concerning crimes committed to conceal it from the proper authorities for fear of personal harm or unwanted publicity."

Wigmore urged the same policy ground in support of this testimonial privilege. Wigmore, Evidence (3d ed., 1940) § 2374. The federal courts also recognize it in all cases where "disclosure is not necessary or desirable to show the prisoner's innocence." *United States v. Li Fat Tong,* 152 F. (2d) 650 (C.C.A. 2d, 1945).

Forcing a Prisoner to Repeat Certain Words to Aid in Identification by Complaining Witness Violates Privilege Against Self-Incrimination—The defendant was arrested on suspicion of rape, and lined up with other prisoners in the county jail. The prosecutrix was placed behind them with no advice as to the identity of the suspect, and each prisoner was forced to repeat certain words which the rapist had spoken during the course of the crime. The prosecutrix's identification rested on her memory of the sound of the rapist's voice from the previous night. The South Carolina court held that while the privilege against self-incrimination did not prohibit the exhibition of physical characteristics plainly visible, it extended to any evidence which was obtained by the aid of the defendant. Thus, the court said, (1) any utterances made voluntarily would be admissible; (2) forcing the defendant to speak but not dictating the text might be permissible since the voice could be said to be a physical characteristic, but (3) the effect of dictating the content of his utterances is to force him to partially re-enact the scene. (*State v. Taylor,* 49 S.E. (2d) 298 (S.C., 1948). In so holding the court drew an analogy to a previous case which held that a sheriff could remove a suspect's shoe and put it in a foot print, but could not actually force the suspect to step in the print himself. (For an extensive discussion of the general problem of the admissibility of evidence obtained by force, and with particular attention to the issue of voice identification, see Vol. 28, No. 2 of this *Journal* at pp. 261-292. Also, as regards the fallibility of voice identification, see Vol. 33, No. 6 at p. 487.)