Journal of Criminal Law and Criminology

Volume 65 | Issue 4 Article 3

1975

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THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 65, No. 4

Printed in U.S.A.

EXCLUSIONARY RULE

United States v. Calandra, 414 U.S. 338 (1974)

In *United States v. Calandra*,[1] the Supreme Court again[2] considered the application of the exclusionary rule in grand jury proceedings. In reversing two lower court decisions the Supreme Court held that a grand jury witness was not entitled to invoke the exclusionary rule in refusing to answer questions based on an illegal search and seizure. In a subsidiary question the Court also denied the witness the right to interrupt the grand jury proceeding in order to have a hearing on the legality of the search.

A warrant was issued to search Calandra's place of business, the Royal Machine & Tool Co., pursuant to a grand jury investigation of gambling operations. On execution of the warrant, the agents found no gambling paraphernalia but seized records of a loanshark operation and various books and documents concerning the suspected loansharking activity.

Calandra was subpoenaed to testify before a grand jury but refused, invoking his fifth amendment privilege against self-incrimination. Having received a grant of transactional immunity,[3] Calandra moved for suppression and return of the illegally seized evidence.[4] Following a hearing in which Calandra reiterated that he would not answer questions based on the illegally seized evidence, the district court granted respondent's motion to suppress[5] and further ordered that respondent need not answer any of the grand jury's questions based on that evidence.[6] The Court of Appeals for the Sixth Circuit affirmed, holding that the exclusionary rule may be invoked by a witness before a grand jury proceeding to bar questioning based on illegally seized evidence.[7]

Two early cases, *Boyd v. United States*,[8] and *Weeks v. United States*,[9] involved application of the exclusionary rule.[10] Both decisions held that no unreasonably or illegally seized evidence could be used in federal criminal cases. The holdings stressed the purpose of the fourth amendment's principles[11] as they affect

[1] 414 U.S. 338 (1974).

[2] *See* United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 9 (1973).

[3] This grant was made pursuant to 18 U.S.C. § 2514 (1971).

[4] This motion was made pursuant to FED. R. CRIM. P. 41(e).

[5] The district court based its decision on the grounds that the affidavit supporting the warrant was insufficient and that the search exceeded the scope of the warrant. *In re* Calandra, 332 F. Supp. 737 (N.D. Ohio 1971).

[6] *Id.* at 746.

[7] United States v. Calandra, 465 F.2d 1218 (1972). The court of appeals agreed with the lower court's finding that the search and seizure of Calandra's place of business were unlawful. 465 F.2d at 1226 n.5. The Supreme Court, while not in accord, failed to contest this finding. It also failed to consider the order to return Calandra's property.

[8] 116 U.S. 616 (1886).

[9] 232 U.S. 383 (1914).

[10] In *Boyd*, the government claimed that the plaintiffs had fraudulently imported goods into the United States and thus forfeited the merchandise. Plaintiffs entered a claim for the goods and pleaded that the goods had not become forfeited as alleged. Claimants brought an invoice for the goods to court to show quantity and value but refused to relinquish it to the district attorney arguing that in a forfeiture suit no evidence can be compelled from the claimants themselves and any statute compelling such evidence is unconstitutional.

In *Weeks*, plaintiff was convicted on the charge of using the mails for the purpose of transporting certain coupons or tickets representing chances or shares in lottery or gift enterprises. Police officers arrested him without a warrant at his place of employment while other police searched his room twice. While there, they took possession of various papers and articles. No warrant was issued for either search. Weeks later filed a "Petition to Return Private Papers, Books, and Other Property" alleging that they were being held unlawfully. The court directed the return of non-pertinent material but refused to rule on the pertinent material. Among the evidence entered at trial, over Week's objections, were lottery tickets and statements with reference to the lottery.

[11] 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, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

the very essence of constitutional liberty and security.[12] Justice Bradley, writing the opinion in *Weeks,* not only found that the exclusion of illegally seized evidence enforces the basic principles of humanity and civil liberty[13] but also felt that if the court admitted such evidence, it would sanction illegal activity by public officials charged with upholding the Constitution.[14] To refuse to return the evidence after timely objection violated the individual's constitutional rights.[15]

Silverthorne Lumber Co. v. United States[16] was the major case in this area, prior to the Court's decision in *Calandra.* In that case federal agents, during a warrantless search of a business, had seized several documents belonging to the Silverthornes. The lumber company owners, under indictment at the time, moved the lower court to have the documents returned on the ground that the search was unconstitutional. The court granted the motion and ordered the documents returned. A federal grand jury issued a subpoena duces tecum to the owners ordering them to produce and turn over the documents seized. The owners refused and were held in contempt. The Supreme Court reversed the contempt citation, holding that the subpoena was the fruit of the illegal search.[17]

In 1961, in a five-to-four decision, the Supreme Court, in *Mapp v. Ohio*[18] declared that the exclusionary rule was constitutionally mandated and therefore had to be followed by all of the states.[19] The Court viewed the fourth amendment as the embodiment in the Constitution of a principle prohibiting unwarranted searches and seizures. The Court then concluded that the exclusionary rule best accomplished this prohibition.

Eight years later in *Davis v. Mississippi,*[20] Justice Brennan, writing for a majority of the Court, held that fingerprints taken from an illegally detained defendant were inadmissible as evidence.[21] Here, however, the Court stated the objective of the exclusionary rule as a sanction to redress and deter overreaching governmental conduct prohibited by the fourth amendment. Relying principally on *Bynum v. United States,*[22] the Court stressed that the overriding consideration of the exclusionary rule is to prohibit any gain to those who violate fourth amendment safeguards. It is irrelevant that the evidence obtained during such seizure and detention is itself trustworthy, that equivalent evidence can conveniently be obtained, or that it may be relatively easy for the government to

[12] *See* Lord Chandler's judgment in Entich v. Carrington, 19 Howell's State Trials 1029.

[13] Justice Bradley relied extensively on Bram v. United States, 168 U.S. 532 (1897).

[14] The effect of the Fourth Amendment is to put the courts of the United States and Federal officials in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of the law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 391.

[15] The Court refused to inquire into the remedies a defendant may have against the officials, "as the Fourth Amendment is not directed to individual misconduct of such officials." 232 U.S. at 398.

[16] 251 U.S. 385 (1920).

[17] Justice Holmes in his opinion stated:

[T]he essence of a provision [the fourth amendment forbidding the acquisition of evidence in a certain way] is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.

Id. at 392.

[18] 367 U.S. 643 (1961).

[19] Historically, there has been a difference of opinion among the state courts as to whether the exclusionary rule is merely a judicially made rule of evidence or whether the Constitution mandated this rule. Before 1961, states had, by their choice, accepted or rejected such a rule.

[20] 394 U.S. 721 (1969).

[21] An eighty-six year old white woman who had allegedly been raped described her assailant as a Negro youth. Police found some fingerprints on the window through which the assailant had apparently entered. The defendant and others were taken to police headquarters where they were questioned and fingerprinted. Several days later, the defendant was jailed and fingerprinted again. His fingerprints matched those on the window of the widow's home. The defendant was convicted of rape, the Court overruling his objection that the fingerprints were inadmissible as the product of an unlawful detention.

[22] 104 App. D.C. 368, 262 F.2d 465 (D.C. Cir. 1958).

prove guilt without using the product of an illegal detention.[23]

In *United States v. Dionisio*[24] and its companion case *United States v. Mara*,[25] Justice Stewart, writing for six members of the Court,[26] expressed the view that compelling a grand jury witness to furnish voice exemplars did not violate the fourth amendment and thus did not requirea preliminary showing of reasonableness.[27] A subpoena to appear before a grand jury is not a seizure in the fourth amendment sense, however inconvenient and burdensome it may be.[28] Additionally, the Court rejected respondent's argument that a command to make a voice exemplar is in itself an infringement of an individual's rights. There is no reasonable expectation that the sound of one's voice will not be known by others.[29]

In the instant case, Justice Powell, writing for six Justices,[30] rejected the court of appeals' interpretation of the exclusionary rule as applied to grand jury proceedings. The Court found no justification in the fourth amendment for restriciting the grand jury's ability to compel a witness to answer questions based on the fruits of an illegal search and seizure.[31]

Justice Powell stated that the prime purpose of the exclusionary rule was to "deter future unlawful police conduct," [32] not to compensate the victim of the unlawful search. Acknowledging that there was little empirical evidence as to the extent of the rule's efficacy, the Court held that the "rule is a judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[33] Thus, Justice Powell argued, the exclusionary rule has and should continue to be used only in situations where incrimination of the search victim is the government's primary goal.[34]

Justice Powell noted that the court of appeals based its justification of the use of the exclusionary rule in the grand jury proceeding on rule 41(e) of the Federal Rules of Criminal Procedure.[35] Rule 41(e) provides in part that "(a) person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for the use as evidence anything so obtained.

[23] In dissenting opinions both Justice Black and Justice Stewart argued that this was an unnecessary expansion of the fourth amendment. Even if the defendant were illegally detained by police, it was not necessary to exclude the fingerprints, which can easily be reproduced at trial. 394 U.S. at 729 (Black, J., dissenting); 394 U.S. at 730 (Stewart, J., dissenting).

[24] 410 U.S. 1 (1973).

[25] 410 U.S. 9 (1973).

[26] Seven members of the Court felt that compelling a grand jury witness to furnish voice exemplars did not violate the fifth amendment privilege against self-incrimination since the exemplar was to be used solely to measure the physical properties of the witness' voice, not for the content of what was said.

[27] A federal grand jury investigating gambling had subpoenaed about twenty persons and directed them to make voice recordings by reading a transcript into a recording device. Dionisio refused and the court held him in contempt after the government was granted a petition compelling compliance. The Court of Appeals for the Seventh Circuit reversed, holding that the fourth amendment required a preliminary showing of reasonableness before the witness could be compelled to furnish the exemplar. United States v. Dionisio, 442 F.2d 276 (7th Cir. 1971). In an earlier case, Gelbard v. United States, 408 U.S. 41 (1971), the Supreme Court held that grand jury witnesses had standing under the wiretap statutes to challenge illegal electronic surveillances.

[28] The Court cited Branzburg v. Hayes, 408 U.S. 665, 682 (1972), which held that "citizens generally are not constitutionally immune from grand jury subpoenas." The overriding feeling was that "the public has a right to every man's evidence." *Id.* at 688.

[29] United States v. Dionisio, 410 U.S. 1, 14 (1973).

[30] Chief Justice Burger and Justices Stewart, White, Blackmun and Rehnquist also joined in the opinion.

[31] 414 U.S. at 347.

[32] *Id.* at 347. Justice Powell cited the Court in Elkins v. United States, 364 U.S. 206, 217 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

Accord, Terry v. Ohio, 392 U.S. 1, 29 (1968); Tehan v. Shott, 382 U.S. 406, 416 (1968); Mapp v. Ohio, 367 U.S. 643, 656 (1961).

[33] 414 U.S. at 348. However, a study has been performed contrasting search and seizure practices in Toronto, Canada, with those in Chicago.

The study concluded that the deterrent rationale for the rule does not seem to be justified (by the empirical study) and Canada's experience with the tort remedy suggests that viable alternatives to the rule do exist.

Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule,* 1 J. Police Sci. & Ad. 36 (1973).

[34] 414 U.S. at 348.

[35] 465 F2d at 1222.

. . . ." In overruling the appellate court, the Supreme Court relied on *Alderman v. United States*,[36] and *Jones v. United States*.[37] The Court in these cases held that rule 41(e) "is no broader than the constitutional rule" and therefore is not a statutory expansion of the exclusionary rule.[38]

The Court also rejected respondent's claim that each and every question based on the fruits of an illegal search and seizure constituted a separate infringement on his fourth amendment rights.[39] Justice Powell reasoned that the wrong committed by the government officials was the original illegal search and seizure; questions based on the illegally obtained material were only a "derivative use of the product" of the unlawful activity.[40] While acknowledging that in a criminal trial the defendant is entitled to exclusion of illegally seized evidence and the derivative use of such evidence, the Court refused to apply that rule in a grand jury proceeding.[41]

While recognizing that the grand jury's subpoena power is not unrestrained, the Court acknowledged a "historically grounded obligation of every person to appear and give his evidence before the grand jury." [42] However, the court cannot force the grand jury witness to answer questions in violation of his fifth amendment privilege.[43] Only a grant of immunity co-extensive with the privilege against self-incrimination may override the fifth amendment claim.[44] A grand jury cannot compel a person to produce books and papers that would incriminate him,[45] nor can it invade an area of privacy protected by the fourth amendment. The fourth amendment also bars issuance of a subpoena duces tecum that is "far too sweeping in its terms to be regarded as reasonable." [46]

Justice Powell argued that the basic function of the grand jury is to protect citizens against unfounded criminal prosecutions and to discover whether probable cause exists to believe a crime has been committed.[47] Relying extensively on *Branzburg v. Hayes*,[48] Justice Powell stated that the grand jury proceeding is not an adversary proceeding but investigatory in scope and thus should not be burdened with the technical rules of evidence.[49]

Along with broad investigatory power, the Court further emphasized that the grand jury must select freely from varied sources of information. The character of evidence discovered should not invalidate an indictment valid on its face.[50]

Justice Powell concluded that in determining whether to apply the exclusionary rule to grand jury proceedings one must "weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context." [51] He again stressed the need for an unhampered investigation, reasoning that separate evidentiary hearings would only delay and disrupt the proceedings.[52]

[36] 394 U.S. 165 (1969).
[37] 362 U.S. 257 (1960).
[38] 414 U.S. at 349 n.6.
[39] *Id.* at 353. Justice Powell stated that the grand jury questions must not merely invade respondent's privacy but must also constitute independent violations of his fourth amendment rights because they are based on illegally seized evidence.
[40] *Id.* at 354.
[41] *Id.*
[42] United States v. Dionisio, 410 U.S. 1, 9 (1973).
[43] Hoffman v. United States, 341 U.S. 479 (1951); Blau v. United States, 340 U.S. 159 (1950); Counselman v. Hitchcock, 142 U.S. 547 (1892).
[44] Kastigar v. United States, 406 U.S. 441 (1972).
[45] *See* Boyd v. United States, 116 U.S. 616, 633 (1886).
[46] *See* Hale v. Henkel, 201 U.S. 43, 76 (1906).
[47] *See* Branzburg v. Hayes, 408 U.S. 665, 686 (1972).
[48] *Id.*
[49] Justice Powell's argument relied on Blair v. United States, 250 U.S. 273 (1919), where the Court stated:

> It [the grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by result of investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Id. at 282.
Similar language is found in Branzburg v. Hayes, 408 U.S. 665, 700 (1972); Costello v. United States, 350 U.S. 359, 364 (1955).
[50] 414 U.S. at 338. The argument followed closely that of the majority in Costello v. United States, 350 U.S. 359 (1955) and Holt v. United States, 218 U.S. 245 (1910). The Court, in Lawn v. United States, 355 U.S. 339 (1958), ruled that an indictment based on information obtained in violation of a defendant's fifth amendment privilege is valid.
[51] 414 U.S. at 349.
[52] *See* Gelbard v. United States, 408 U.S. 41, 70 (1971) (White, J., concurring).

Against this potential damage to the grand jury process the Court weighed the benefits of excluding the illegally seized evidence. Recognizing that the rule is an effective measure at trial, the Court pointed out that not every method of deterring unlawful police conduct has been adopted.[53] In line with their position that the exclusionary rule serves merely to deter unlawful official conduct, the Court found that the slight additional deterrent effect is far outweighed by the potential damage to the grand jury process. The Court believed that the application of the rule would only deter the collection of evidence during a grand jury investigation where there is already enough incentive to observe the provisions of the fourth amendment since illegally seized evidence, although admissible at the grand jury stage, is not admissible at trial proceedings.[54]

In his dissent,[55] Justice Brennan rejected the majority's conclusion that the main objective of the exclusionary rule is the deterrence of unlawful police conduct, and called it a "startling misconception . . . of the historical objective and purpose of the rule." [56] He viewed the exclusionary rule as merely a tool to further implement the provisions of the fourth amendment. Curtailment of the evil is, at most, a "hoped for effect of the exclusionary rule, not its ultimate objective." [57]

Justice Brennan further stated that the exclusionary rule works towards minimizing the loss of public trust in government by separating the judiciary from officials acting in lawless activity. In *Weeks,*[58] the Court pointed out that sanctioning such illegal official behavior is overtly opposed to the objectives of the fourth amendment. Justice Brennan acknowledged that the Court in *Mapp v. Ohio,*[59] considered the deterrent effect, but argued that that consideration did not justify the majority citing it as the sole determinant.[60]

Justice Brennan viewed *Silverthorne* as controlling, where, as here, a grand jury witness sought to avoid supplying the grand jury with illegally seized evidence.[61] Justice Brennan disagreed with the majority's contention that *Silverthorne* did not control because the Silverthornes had already been indicted and had invoked the rule as criminal defendants. He argued that the Court overlooked the fact that the grand jury's interest in again obtaining documents from the Silverthornes may have been to secure information leading to further criminal charges.[62]

Justice Brennan also rejected the majority's reasoning that the witness' fourth amendment rights are protected "by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victims."[63] He viewed the search as a violation of Calandra's fourth amendment rights and felt that the majority was withholdng proper relief. Justice Brennan feared that his colleagues were about to abandon the exclusionary rule in all search and seizure cases, a rule, which "gave light to Madison's prediction that 'independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' " [64]

[53] In Alderman v. United States, 394 U.S. 165, 174 (1969), the Court refused to extend the exclusionary rule to anyone except the victim of the search.

[54] 414 U.S. at 351. The Court reasoned further that a prosecutor would be unlikely to obtain an indictment if he felt he would be unable to get a conviction.

[55] He was joined by Justices Douglas and Marshall.

[56] 414 U.S. at 356 (Brennan, J., dissenting).

[57] *Id.*

[58] 232 U.S. 383, 391 (1914). *Accord,* Terry v. Ohio, 392 U.S. 1, 12 (1968); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, Holmes, JJ.; dissenting).

[59] 367 U.S. 643, 651 (1961).

[60] 414 U.S. at 359 (Brennan, J., dissenting).

[61] *Id.* at 360 (Brennan, J., dissenting).

[62] *Id.* at 362 (Brennan, J., dissenting). Justice Brennan cited the enactment of 18 U.S.C. § 2515 (1971) by Congress as an outgrowth of the *Silverthorne* case. It provides that:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived there from may be received in evidence in any . . . proceeding in or before any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter.

Justice Brennan also cited the Court in *Silverthorne* in its comment on the new law:

> Moreover, § 2515 serves not only to protect the privacy of communications, but also to insure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also to protect the integrity of court and administrative proceedings.

408 U.S. at 51.

[63] 414 U.S. at 351 (Brennan, J., dissenting). Having been granted transactional immunity anyway, Calandra could not be criminally prosecuted.

[64] *Id.* at 366 (Brennan, J., dissenting). *See* 1 ANNALS OF CONG. 439 (1778).

Both the majority and dissenting opinions considered at length the historical function of the grand jury. The majority stressed its investigatory purpose which was not to be unnecessarily hampered. The dissent stressed the need to protect citizens from harassment by the government. The majority took the view that the grand jury is necessary to secure the fair and prompt administration of criminal justice. The right of privacy is secondary to the search for the truth in the grand jury proceedings. In going beyond *Dionisio,* the majority found no reasonable expectation of privacy in private papers when they are pertinent to a grand jury investigation. It is every person's duty to come forward and give his evidence; considerations of privacy are secondary. It was the majority's view that the exclusionary rule is necessary only to deter future unlawful official conduct. Once the wrong has been committed, there is no need to suppress evidence which has been uncovered for use in the grand jury investigation.

Although this case severely limits the application of the exclusionary rule in grand jury proceedings, use of the rule is still preserved at trial. The Court seemed to feel that because the grand jury is merely an investigatory and intermediary step in the administration of justice, to allow interminable objections and hearings into the admission of evidence would unnecessarily delay the criminal justice process.