Journal of Criminal Law and Criminology

Volume 47 | Issue 5 Article 17

1957

Police Science Legal Abstracts and Notes

POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

Warren L. Swanson and Roger Eichmeier*

Later Search Without Warrant for Articles Overlooked During Arrest Held Lawful—A police officer went to the defendant's home in order to pick up clothing requested by the defendant's roommate who was being held at the city jail. Admitted by the landlady, the officer, while looking for the requested clothing, came upon a marijuana cigarette and paraphernalia employed in the use of narcotics. Thereafter, the defendant entered the building and, at the officer's request, invited the latter to "go ahead and look around." Upon the basis of evidence discovered in the search, the defendant was arrested and taken to the police station. Some hours later, the officer returned to the residence and retrieved narcotics equipment which had been left behind at the time of the arrest. At the trial, the court denied defendant's motion to exclude the evidence obtained in the search. On appeal, the admission of the evidence was affirmed. *People v. Stewart*, 301 P.2d 301 (Cal. Dist. Ct. of Appeals 1956).

The search of the defendant's premises at the time of the arrest was made with the defendant's consent, the court said, and was therefore lawful. Since the narcotics paraphernalia could have been taken by the police officers at the time the arrest was made, the court observed, the officer could lawfully return and retrieve the article at a later time without first obtaining a search warrant.

Federal Officer's Inducement of Defendant to Commit Crime is Not Entrapment Even Though Defendant Had Never Before Committed Such Crime—The defendant, a gambler who had never engaged in the narcotics trade, was approached by a federal narcotics agent who represented himself to be a buyer of heroin in large quantities. In response, the defendant stated that, while he was primarily a gambler and not a narcotics peddler, he knew where heroin could be obtained. After several unsuccessful attempts by the defendant to obtain narcotics for the agent, a sale was consummated and, as a result, the defendant was arrested. At the trial in a federal district court, the defendant, admitting the sale, pleaded entrapment. The trial court, denying the defendant's request for a directed verdict of acquittal, submitted the question of entrapment to the jury. The United States Court of Appeals for the Second Circuit, with one member dissenting, affirmed the defendant's conviction. *United States v. Masciale*, 236 F.2d 601 (2nd Cir. 1956).

The majority acknowledged that the sale of heroin was induced by the government agent and that, therefore, the prosecution had the burden of proving sufficient excuse for the inducement. Inducing the defendant to commit a crime is lawful, the court said, if "the accused was ready and willing to commit the offense charged whenever the opportunity offered." The test of entrapment, the court indicated, is whether the defendant required "persuasion" to commit the illegal act. The inducement without the element of persuasion, it was said, does not constitute entrapment. The defendant's willingness to obtain heroin for the agent, the majority said, indicates that persuasion was unnecessary.

The dissent argued that the test of entrapment adopted by the majority contradicts the rule set out by the United States Supreme Court in *Sorrell v. United States*, 287 U. S. 435 (1932) in which it was said that persuading a person to commit a crime is a valid method of obtaining evidence of criminal activity "only if the defendant's past conduct justifies the belief that, without persuasion by a government officer, the defendant would have com-

*Senior Law Students, Northwestern University School of Law.

mitted the crime or a similar crime." By this test, the dissent maintained, the defendant must have previously committed a substantially similar crime as that induced or the inducement will constitute entrapment. The dissent could see no rational basis for the distinction made by the majority between an easy and a difficult persuasion. As a practical matter, it was said, the degree of persuasion necessary to constitute entrapment will be impossible to ascertain. "The result will be," the dissent observed, "that the federal police—instead of devoting themselves to the job of catching criminals—may, when it pleases them, spend their time and government money turning potential into actual criminals, shoving over into criminals men who may be hovering on the brink."

Results of Lie-Detector Test Are Admissible to Rebut Unfavorable Inferences Raised by Opponent's Statement that He Had Taken Test—Upon the destruction of his home by fire, the plaintiff filed a claim with the defendant insurance company which had issued a policy insuring the dwelling against such an occurrence. The claim was rejected by the defendant on the grounds that the blaze had been deliberately set by or at the instigation of the plaintiff. Thereupon, the plaintiff submitted to a lie-detector test which was administered by an arson investigator for the City of Houston, Texas. Subsequently, suit was brought by the plaintiff against the insurance company for the proceeds of the policy. At the trial, before the judge and without a jury, in a federal district court, the plaintiff, testifying in his own behalf, volunteered the information that he had agreed to take a lie-detector test. However, the plaintiff did not reveal the results of the test. Thereafter, the defendant offered the testimony of the investigator who had conducted the lie-detector examination. The witness stated that he had interpreted the results of the test as indicating that the plaintiff had lied when he answered "no" to such questions as: "do you know who set fire to your house?; did you set fire to your house?; did you ever set fire to a building?; were you in your house when the fire started?; did you have someone set fire to your house?" At the conclusion of the evidence, the trial judge indicated that he would consider the testimony of the lie-detector expert only for purposes of impeaching the credibility of the plaintiff as a witness; such evidence, the judge said, would not be admissible for any other purpose. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court for the plaintiff and approved the introduction of the lie-detector results for the limited purpose of removing the inferences raised by the plaintiff's statement that he had agreed to take such a test. *California Insurance Company v. Allen*, 235 F.2d 178 (5th Cir. 1956).

The court rejected the defendant's contention that when the plaintiff injected into the case, in his own behalf, that he had agreed to take a lie-detector test, the results of the test became admissible for all purposes. The trial court, it was said, had wisely exercised its discretion over the admission of evidence by limiting the use of the test results to "the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." The court did not decide the question of whether the trial court would have abused its discretion had it admitted the test results for their general probative value in rebuttal of the plaintiff's entire testimony. However, an examination of decisions from other jurisdictions, it was said, revealed an almost unanimous rejection of the results of lie-detector tests as evidence.

Evidence of Defendant's Offer to Take a Lie-Detector Test Is Inadmissible—The defendant was indicted for murder. At the trial, the defendant sought to introduce testimony to the effect that two or three months after his arrest he had expressed a willingness to submit to a lie-detector test. Such an offer, the defendant maintained, indicated a "consciousness of innocence." The Supreme Court of Pennsylvania approved the refusal by the trial judge to admit evidence of the defendant's offer. *Commonwealth v. Saunders*, 125 A.2d 442 (Pa. 1956).

Since the results of a lie-detector test cannot

be considered as evidence, it was said, the circumstance of an offer or refusal to undergo such a test should not be admissible. "Defendant's offer," the court concluded, "was merely a self-serving act or declaration which obviously could be made without any possible risk, since, if the offer were accepted and the test given, the result, whether favorable or unfavorable to the accused, could not be given in evidence." See also, *Commonwealth v. McKinley*, 123 A.2d 735 (Pa. 1956).

Judicial Notice Accorded Radar Speedmeter as a Device for Measuring Automobile Speed—The defendant was arrested for exceeding the speed limit on the basis of evidence obtained through the use of a radar speedmeter. At the trial in a New York City Magistrate's Court, the arresting officers, who had received training in the use of the equipment, testified that the radar unit used consisted of a transmitter-receiver which sent and received micro waves, an indicator which registered the rate of speed of automobiles passing through the beam cast by the transmitter, and a recording device which graphically registered the speed indicated. The equipment was installed in a squad car stationed along the highway being checked. A thousand feet in front of the radar vehicle an intercepting car was stationed which, upon receipt of a description of the violator from the radar unit, made the arrest. The violator remained in view of the radar car, as well as the intercepting squad car, until apprehended. Testimony indicated that the radar device was tested at the beginning and end of the day by driving a motorcycle with a calibrated speedometer through the radar beam and comparing the speed arrived at by the radar with that indicated on the motorcycle speedometer. Expert testimony was offered as to the nature and function of the device. It was stated by the expert that radar is an accurate method of speedchecking, "but subject to an engineering tolerance of two miles per hour, plus or minus." The defendant argued that, because of this variation, radar is not reliable evidence that an offender drove at a certain rate of speed in excess of the speed limit.

Proof of a lesser prohibited rate of speed, the defendant said, would be proof of an offense other than that charged. The court rejected this notion, holding that proof of any speed in excess of the legal limit is sufficient to establish a conviction and is included within a charge of driving at a specific excessive rate. The fact that radar devices have a small inherent degree of error, the court said, will not prevent their use as evidence. In addition, the court concluded that such devices are of sufficient scientific worth to be introduced in the evidence, in future proceedings, without preliminary expert testimony as to their nature and function. The appellate courts of New York, it was said, have not as yet considered this question; however, other jurisdictions in increasing numbers have accorded judicial notice to the accuracy of reasonably tested radar devices. Noting the judicial acceptance accorded to other scientific law enforcing aids, the court said that "to deny such recognition to an adequately tested radar speedmeter unless expert testimony is first given as to its nature and function is to make a fetish of expert testimony." However, it was said, such judicial notice will not establish radar results as conclusive evidence of guilt. The degree of error inherent in the function of the device, the court indicated, will provide a substantial question as to the weight to be accorded the evidence. *People v. Nasella*, 155 N.Y.S.2d 463 (N. Y. City Magistrate's Ct.-1956).

Free Replay Feature Makes Pinball Machine a Gambling Device—Plaintiff, a pinball machine operator, sought a declaratory judgment that a "Skill Pool" type of machine does not violate an Ohio statute which prohibits the keeping of a "gambling device for gain." Plaintiff's coin-operated machines offered a free replay to players who attained a certain score. Such a prize, it was contended, is not sufficient to constitute gambling. In addition, plaintiff claimed, the attainment of a score necessary to obtain a free replay is predominantly dependent upon skill rather than chance. The Supreme Court of Ohio held that the machine constituted a gambling device. *Wester-*

haus v. City of Cincinnati, 135 N.E.2d 318 (Ohio 1956).

"The elements of gambling," the court said, "are payment of a *price* for a *chance* to gain a *prize*." The player, it was said, pays a price to operate the machine. As for the element of chance, the court observed that, "although it would be inaccurate to say that there can be a gamble upon something certain, there can be a gamble on the happening of an event, the happening of which may be largely dependent upon skill, even the skill of a participant." The element of a prize, it was said, may be found in the avoidance of payment for something of value. Amusement obtained through the operation of a pinball machine is a thing of value. Therefore, the court concluded, a free replay is a sufficient prize to qualify, when the other elements are present, a pinball machine as a gambling device.

Listening in on Extension Telephone Does Not Violate Wire Tap Act—The defendant was indicted on the charge of transmitting threats over an interstate telephone connection for purposes of extortion. At the trial in a federal district court the prosecution sought to introduce testimony of state police officers who, at the invitation of the complainant, had listened in on an extension phone to a call made to the complainant by the defendant. The defendant contended that the officers' testimony would violate the "Wire Tapping Statute," 47 U.S.C.A. §605 which provides in part that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." The United States Court of Appeals for the Tenth Circuit approved admission of the testimony. *Rathbun v. United States*, 236 F.2d 514 (10th Cir. 1956).

It is well settled, the court said, that an unauthorized interception may not be revealed without the consent of the sender. However, only the sender may invoke the protection of the statute and, in addition, the communication is protected only if intercepted prior to its receipt by the other party to the conversation. Therefore, the questions to be decided, it was said, are the identity of the sender and what constitutes interception. The court held that while both parties are alternately senders and receivers during a phone conversation, the party who initiates the call is the sender under the statute. What constitutes an interception, the court indicated, is a question of mechanics and depends upon whether the extension is so attached to the telephone line as to allow the message to reach the party listening in before reaching the intended receiver. Accepting the determination of the trial court that the receiver and the listener heard the conversation simultaneously, the court concluded that no interception had taken place.

Eighteen-Hour Delay in Arraignment Precludes Use of Confession in Federal Court—At 7:00 p.m. the defendant was arrested and taken to the police station. A 45-minute interrogation began at 8:00 p.m. The questioning was resumed at 11:00 p.m. and continued until midnight when the defendant was produced at a police line-up. Intermittent questioning took place between 12:30 a.m. and 3:00 a.m. during which time a lie-detector test was administered to the defendant. Between 3:00 a.m. and 4:00 a.m. the defendant retracted his former denials of guilt and made a full oral confession. Then defendant slept until 7:30 a.m. at which time, upon awakening, he repeated his oral confession. At 9:30 a.m. the defendant was taken to the scene of the crime to re-enact the occurrence. Upon his return to police headquarters, a written confession was prepared which the defendant signed at 2:00 p.m. Thereafter the defendant was arraigned before a United States Commissioner. At the trial, the court admitted both the oral and written confession over the defendant's objection that they were obtained in violation of rules 5(a) and (b) of the Federal Rules of Criminal Procedure which require that an accused be taken before the nearest available magistrate without unnecessary delay, and that, once arraigned, the defendant be advised of his right to counsel and that any statements made by him might be used against him. The prosecutor, in his

argument to the jury, stated that the questioning took place intermittently during the entire night because, by the next morning, "we would find the place crawling with attorneys telling him, 'you don't have to talk to the police.'" The United States Court of Appeals for the District of Columbia Circuit reversed defendant's conviction, holding that, while the oral confessions were properly admitted, the written confession should have been excluded. *Watson v. United States*, 234 F.2d 42 (D.C. Cir. 1956).

The court had little difficulty in concluding that no unnecessary delay was involved in securing the oral confessions which were made at 3:30 a.m. and repeated at 8:00 a.m. The police, it was said, are entitled to a reasonable period following the arrest in which to question the defendant and make inquiry to determine whether a complaint is warranted. However, the court said, by 9:00 a.m. the police possessed sufficient facts to justify filing a complaint. In addition, at that time, judges and commissioners were available before whom arraignment could be had. The subsequent delay, the court said, was clearly unnecessary. However, it was said, mere delay in arraignment will not invalidate a confession obtained during its continuance. The delay must be "for the very purpose of securing these challenged confessions" and in addition, the detention must have "produced the disclosure." The arguments of the prosecutor during the case, the court stated, indicated that the purpose of the delay was to avoid the effects of rule 5(b); once advised of his right to counsel, interrogation of defendant would be difficult. Therefore the delay was for the purpose of securing the written confession. In addition, the court thought it clear that the cumulative effect of the detention produced the written confession.

Reckless Driving through Several Counties Is Only One Offense—Defendant was pursued through two counties at ninety miles per hour and, upon his apprehension, was tried and convicted in both counties for violating a state statute prohibiting reckless driving. On appeal it was held that the conviction in the first county constituted res judicata as to the charge in the second county and that a second prosecution would place the defendant in double jeopardy. Where a violation of a state statute is charged, the court indicated, the crossing of county lines does not create a new offense. *State v. Willhite*, 123 A.2d 237 (N. J. 1956).

(For other recent case abstracts, see pages 574–579)