Journal of Criminal Law and Criminology

Volume 64 | Issue 3 Article 4

1974

Recent Trends in the Criminal Law

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 64, No. 3

Printed in U.S.A.

RECENT TRENDS IN THE CRIMINAL LAW

SEARCH AND SEIZURE

In *United States v. Gamble*, 473 F.2d 1274 (7th Cir. 1973), the seventh circuit held that a warrantless "protective sweep" of a house which resulted in the seizure of a gun was unjustified. Although the police were executing an arrest warrant for a member of a robbery gang, the court ruled that the officers exceeded the proper scope of a search incident to an arrest.[1] *United States v. Harris*[2] was distinguished on the basis that other members of the gang were not at large, having already been taken into custody. The court found that the defendant's reputation as a gunslinger, the fortress aspect of his house, and the fact that there had been a gathering earlier in the day there of 20–30 persons were not sufficient exigent circumstances.

The second circuit in *United States v. Riggs*, 474 F.2d 699 (2d Cir. 1973), held that a New York airport's deputy marshal's request for identification and their search of a camera bag were justified in that probable cause existed for an arrest. "Specific and articulable facts"[3] communicated to the New York deputy marshals by Michigan State Police provided the justification for an invasion of defendant's privacy: she had purchased an airline ticket in Detroit using a different name from that she used in New York; she had lied about the contents of a brown paper bag she opened for inspection on boarding the plane in Detroit; and she had reminded Detroit Federal Bureau of Narcotics Agents of a narcotics dealer known to them. The court stated that when the defendant opened her purse and exposed to "plain view" white powder, the New York deputy marshals had probable cause to arrest. Though the marshals did not arrest her until a test of the powder found in the purse and camera proved to be heroin, the court ruled that a search of the camera would have been justified under the "grabbing distance" principle of *Chimel v. California*.[4]

Chimel was found by the Minnesota Supreme Court in *State v. Cross*, 206 N.W.2d 371 (Minn. 1973), to limit a search incident to a minor-offense arrest to weapons and evidence of the underlying crime unless exigent circumstances establish probable cause to believe that the person is armed or otherwise dangerous or has committed a more serious offense. A reliable informer's tip that the wanted man was in possession of marijuana and a gun was adequate, according to the court, to provide the foundation for a belief that exigent circumstances existed to warrant a search more extensive than a pat-down. Without such exigent circumstances, the court believed that the Fourth Amendment test of reasonableness precludes anything more than a pat-down of the garments of a person arrested for a minor offense.

In *United States v. Simmons*, 302 F.2d 728 (D.C. Cir. 1973), the D.C. Court of Appeals set itself in direct opposition to the D.C. Circuit in *United States v. Robinson*, 475 F.2d 376 (D.C. Cir. 1973), a case involving circumstances notably similar to those the D.C. court was considering. The D.C. Court of Appeals held that a full search of a traffic offender who was arrested and was to be taken into custody is properly incident to the arrest. This is contrary to the D.C. Circuit's five to four decision in *Robinson* wherein the court there held the Fourth Amendment precludes anything beyond a *Terry*-type[5] frisk of the arrestee's outer clothing for weapons. The D.C. Court of Appeals founded its disagreement with the D.C. Circuit on the following: (1) *Terry* dealt with circumstances which fell short of establishing probable cause; (2) *Terry* standards do not apply to valid arrests; and (3) an extension of *Terry*, as in *Robinson*, would lead to making the nature of the offense the key to whether a full search may be undertaken. This latter result, the D.C. Court of Appeals thought, would create a judicial morass, complicate the day-to-day performance of the police officer, and possibly endanger the safety of the officer.

OBSCENITY

The *Roth-Memoirs* test[6] was found by the first circuit in *United States v. Palladino*, 475 F.2d 65

[1] *See* Chimel v. California, 395 U.S. 752 (1969).
[2] 435 F.2d 74 (D.C. Cir. 1970).
[3] Terry v. Ohio, 392 U.S. 1, 21 (1968).
[4] 395 U.S. 752, 763 (1969).
[5] Terry v. Ohio, 392 U.S. 1 (1968).
[6] The test is that (a) the dominant theme of the ma-

(1st Cir. 1973), to require experts to guide the jury in deciding an obscenity issue. While the experts will not render the process of adjudicating obscenity a completely rational one, the court recognized, nonetheless, fundamental fairness and due process demand that the applicable test be put in a context which will enable the jurors to think and experience contemporarily and nationally, the court argued. It was the court's judgment that a federal law requires an even and equal application which a jury left to its own concepts of offensiveness might not render.

An overly broad ordinance banning any outdoor screen display of certain parts of the female anatomy was struck down as unconstitutional by the seventh circuit in *Cinecom Theaters, Inc. v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973). The city's first justification, resting on the protection of children or minors from harmful material, was found wanting in that it protected beyond the concept of variable obscenity.[7] The First Amendment, the court determined, extends to children and protects their freedom of speech and expression, which the ordinance would curtail. The city's second justification, involving the protection of neighbors or passers-by from having offensive scenes unwillingly thrust upon them, failed to meet the test of *Cohen v. California*,[8] that substantial privacy interests were being invaded in an essentially intolerable manner.

IMPEACHMENT

The first, third and fifth circuits found, respectively, that reversed prior convictions, silence at time of arrest, and wiretaps not yet ruled admissible all conformed with *United States v. Harris*, 402 U.S. 222 (1971), and were admissible to impeach defense statements.

In *United States v. Penta*, 475 F.2d 92 (1st Cir. 1973), the first circuit held that prior state convictions which had been reversed subsequent to the start of the federal trial could be used to impeach the defendant's claims of entrapment. The court considered the following factors to be determinative: first, the reversal came not from lack of counsel[9] which might make the resulting conviction untrustworthy, but from an unlawful search and seizure which would actually make the conviction more, not less, trustworthy. Second, any deterrence meant to be brought about by the exclusion of the invalidly seized evidence had already been achieved in the case in chief in which it had been offered. Third, requiring the federal judge at the beginning of trial to investigate whether any prior convictions might still be overturned would be too demanding. The first circuit limited its holding to the situation where the federal trial had begun before the prior convictions were reversed. The court acknowledged that it was holding contrary to the fifth circuit in *Beto v. Stacks*,[10] a case involving a factual situation virtually identical to the one this court had to address.

The third circuit in *Burt v. New Jersey*, 475 F.2d 234 (3d Cir. 1973), allowed a defendant's failure to seek aid or to tell someone of an "accidental" shooting to be used by the prosecution in its summation to impeach the defendant's statement that the shooting had taken place accidentally. Originally, the defendant was arrested for another offense, but within a short time and distance from the "accidental" shooting. He did not mention to the arresting officers or to any one else that he had shot a man accidentally and was not sure whether the injured man was living or dead.

In *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973), the fifth circuit permitted the prosecution to use wiretaps not determined to be lawful to impeach the defendant's denial he had engaged in bookmaking activity. The court found that *Walder v. United States*,[11] when joined with *United States v. Harris*,[12] controlled. Although *Walder* was pre-Title III of the Omnibus Crime Control Act of 1968,[13] the court believed that section 2515[14] of the act left *Walder* intact.

terial taken as a whole appeals to a prurient interest in sex; (b) it is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

[7] *See* Ginsburg v. New York, 390 U.S. 629 (1968).

[8] 403 U.S. 15 (1971).

[9] *See* Loper v. Beto, 405 U.S. 473 (1972).

[10] 408 F.2d 313 (5th Cir. 1969).

[11] 347 U.S. 62 (1954).

[12] 401 U.S. 222 (1971).

[13] *See* 18 U.S.C. § 2510 *et seq.* (1970).

[14] Section 2515 provides in pertinent part:
Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this subchapter. 18 U.S.C. § 2515 (1970).

ELECTRONIC SURVEILLANCE

Title III of the Omnibus Crime Control Act of 1968 was interpreted in fifth, seventh and ninth circuit decisions which held wiretap applications defective. The Minnesota supreme court and the Essex, New Jersey, county court, considering state statutes modeled on sections 2516 and 2518 of the federal statute, likewise concluded the wiretap applications involved were defective.

The fifth circuit in *United States v. Robinson*, 472 F.2d 973 (5th Cir. 1973), and the seventh circuit in *United States v. Roberts*, 477 F.2d 57, (7th Cir. 1973), found that Attorney General Mitchell had delegated to his Executive Assistant, Mr. Lindenbaum, a general authority pursuant to law.[15] However, both courts interpreted section 2516 as forbidding the exercise of the function of authorizing an application for a wiretap by anyone other than the Attorney General personally or one of the Assistant Attorneys General especially designated by the Attorney General. Mr. Lindenbaum had not been specially designated by the Attorney General. Therefore, the courts held that all information obtained by means of the improperly authorized wiretaps must be suppressed.

In *United States v. Chavez*, 478 F.2d 512 (9th Cir. 1973), the ninth circuit found a memorandum by Attorney General Mitchell, a letter by Assistant Attorney General Wilson and an application for a wiretap an elaborate charade. A later affidavit by the former Attorney General, Mr. Mitchell, stated that he had not made a special designation of any Assistant Attorney General. Nevertheless, the court accepted the argument that substantial compliance with section 2516 had occurred. Yet, it suppressed the evidence on the basis that section 2518 (1)(a)[16] and (4)(d)[17] had not been complied with in that there had not only been an omission of the required identification of the party authorizing the application, but also a misrepresentation as to who that party was.

The Minnesota supreme court in *State v. Frink*, 206 N.W.2d 664 (Minn. 1973), held that the Minnesota Privacy of Communications Act[18] allows only the principal prosecuting attorney within the county to initiate an electronic surveillance and that he could not delegate the exercise of this power to an assistant. In suppressing evidence derived from the invalid wiretap, the court found its holding in conformity with federal interpretation of the federal statute.

In *State v. Cocuzza*, 301 A.2d 204 (N.J. 1973), the Essex, New Jersey, county court suppressed evidence derived from a wiretap it held invalid because not in conformity with the state statute authorizing electronic surveillance.[19] The court held that delegation of his authority by the county prosecutor to an assistant fell short of the statutory requirement.

[15] 28 U.S.C. § 510 (1970).

[16] Section 2518 (1)(a) provides that each "application for an order . . . shall . . . include . . . the identity of . . . the officer authorizing the application." 18 U.S.C. § 2518 (1)(a) (1970).

[17] Section 2518 (4)(d) provides the same requirement as to identity for the order as for the application. 18 U.S.C. § 2518 (4)(d) (1970).

[18] MINN. STAT. ANN. § 626A (1946–48).

[19] N.J. STAT. ANN. § 156A-8 (1931).