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Evidence - Unreasonable Search and Seizure - Pre-Trial Motion To Suppress

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would seem, then, that a claimant should be permitted to testify if supported by witnesses testifying to circumstances.

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EVIDENCE — UNREASONABLE SEARCH AND SEIZURE — PRE-TRIAL MOTION TO SUPPRESS

Defendants were indicted for criminally receiving and concealing stolen property. Before trial they moved for an order to suppress evidence on the basis that it was obtained as the result of an unreasonable search and seizure.[1] New York law contained no procedure for the suppression of such evidence.[2] The Queens County Court of New York, *held,* motion granted to the extent that a pre-trial hearing should be held. The trial court has the power, even in the absence of express statutory authorization, to consider and pass upon the propriety of suppressing evidence prior to trial. *People v. DuBois,* 221 N.Y.S. 2d 21 (Queens Cy. Ct. 1961)

In *Weeks v. United States*[3] the United States Supreme Court held that it was prejudicial error in a federal criminal prosecution to admit evidence obtained by federal officers through means violative of the fourth amendment. However, the court specifically stated that the amendment was not directed to the misconduct of state officers.[4] Later, in *Wolf v. Colorado,*[5] the Court decided that the principle of privacy underlying the fourth amendment was protected against arbitrary state action as a part of the concept of ordered liberty embodied in the fourteenth amendment. Nevertheless, the fourteenth amendment was held not to forbid the admission in state courts of evidence obtained by unreasonable searches and seizures. In 1961 the Supreme

were not "eye-witnesses" to the agreement to reward the claimant, the court said they met the requirement of a witness other than the claimant.

1. One defendant's affidavit stated that the police officers had forced open the door of her home, entered without her consent, and conducted a search without a search warrant. The police affidavit denied these assertions. People v. DuBois, 221 N.Y.S.2d 21 (Queens Cy. Ct. 1961).

2. This was due to New York's long history of admission of evidence obtained through illegal searches and seizures. See People v. Richter's Jewelers, 291 N.Y. 161, 51 N.E.2d 690 (1943) ; People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926) ; People v. Adams, 176 N.Y. 351, 61 N.E. 636 (1903).

3. 232 U.S. 383 (1914).

4. *Id.* at 398.

5. 338 U.S. 25 (1949).

Court in part overruled *Wolf* in *Mapp v. Ohio*,[6] holding that state courts are compelled to exclude evidence obtained by state officers in violation of the fourth amendment prohibition against arbitrary police intrusion. Four Justices were of the opinion that the exclusionary rule is a necessary ingredient of the fourth amendment which applies *in toto* against the states through the fourteenth amendment. Mr. Justice Black did not agree that the exclusionary rule is part and parcel of the fourth amendment but concurred in the result reached, on the basis that the fourth amendment in tandem with the fifth operates directly against the states to compel the exclusion of such evidence.

The 1904 case of *Adams v. New York*[7] established, in federal law, the premise that the means of obtaining evidence would not be inquired into upon trial so long as the evidence is otherwise competent. The *Weeks* case, in establishing the exclusionary rule, distinguished the *Adams* case as presenting a situation where the defendant had failed to move seasonably for a return and suppression of the evidence unlawfully obtained. Upon the strength of this decision the federal courts proceeded to fashion a general proposition that an objection to evidence as obtained by an unreasonable search and seizure comes too late where it has been made for the first time at the trial, and not by a pretrial motion to return the property or suppress the evidence.[8] Exceptions to the rule were found in cases where there was no opportunity to present the matter in advance of trial[9] or where prior testimony had established as indisputable the fact of the unreasonable search and seizure.[10] In recent years the federal courts have modified the requirement by allowing the trial court in its discretion to entertain the motion for the first time at the trial.[11] Rule 41(e) of the Federal Rules of Criminal Procedure is substantially a codification of this jurisprudence:

6. 367 U.S. 643 (1961).

7. 192 U.S. 585 (1904).

8. See Segurola v. United States, 275 U.S. 106 (1927); Williams v. United States, 215 F.2d 695 (9th Cir. 1954); United States v. Sferas, 210 F.2d 69 (7th Cir. 1954); Garhart v. United States, 157 F.2d 777 (10th Cir. 1946); Rose v. United States, 149 F.2d 755 (9th Cir. 1945); United States v. Wernecke, 138 F.2d 561 (7th Cir. 1943), cert. denied, 321 U.S. 771 (1944).

9. Angello v. United States, 269 U.S. 20 (1925); Gouled v. United States, 255 U.S. 298 (1921). See Segurola v. United States, 275 U.S. 106 (1927).

10. Angello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921).

11. Panzich v. United States, 285 Fed. 871 (9th Cir. 1923); United States v. Leiser, 16 F.R.D. 199 (D. Mass 1954); United States v. Johnson, 76 F. Supp. 538 (M.D. Pa. 1947). See United States v. Asendio, 171 F.2d 122 (3d Cir. 1948); People v. Berger, 282 P.2d 509 (Calif. 1955).

> "A person aggrieved by an unlawful search and seizure may move . . . for the return of the property and to suppress for use as evidence anything so obtained. . . . The judge shall receive evidence on any issue or fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. . . . The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."[12]

The New York court in the instant case was presented with the problem of determining the character of evidence alleged to be inadmissible under the *Mapp* decision without the authority of controlling procedural legislation.[13] In assuming the power to determine the issue in advance of trial the court assimilated its practice to that employed under the Federal Rules of Criminal Procedure. No inconsistency was found under New York law with the federal view that a factual dispute as to the legality of the search and seizure is triable by the court without a jury, since the issue is regarded as not immediately relevant to the question of guilt.[14] The court reasoned that justice to the defendant and expedition of criminal litigation demand the earliest possible determination of the question.[15] The two-fold purpose of the procedure adopted was deemed the enforcement of the fourth amendment and the maintenance of a well-ordered trial procedure.

As the federal motion to suppress evolved, there was uncertainty as to whether the exclusionary rule was an evidentiary

12. FED. R. CRIM. P. Rule 41(e). For similar requirements in state courts see State v. Lock, 302 Mo. 400, 259 S.W. 1116 (1924); Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952); People v. Grod, 385 Ill. 584, 53 N.E.2d 591 (1944); Annot., 50 A.L.R.2d 583 (1956).

13. For other recent state court opinions discussing this problem, see Thompson v. State, 132 So.2d 386 (Ala. App. 1961); State v. Trumbull, 176 A.2d 887 (Conn. App. 1961); State v. Pokini, 367 P.2d 499 (Hawaii 1961); Shorey v. State, 177 A.2d 245 (Md. App. 1962); State v. Valetin, 36 N.J. 41, 174 A.2d 737 (1961); Application of Bogish, 173 A.2d 906 (N.J. App. 1961); People v. Gonzales, 221 N.Y.S.2d 846 (N.Y. Cy. Ct. Gen. Sess. 1961); People v. Angelet, 221 N.Y.S.2d 834 (N.Y. Cy. Ct. Gen. Sess. 1961); People v. Atkins, 221 N.Y.S.2d 780 (N.Y. Cy. Ct. Gen. Sess. 1961).

14. Ford v. United States, 273 U.S. 593 (1927); Steele v. United States, 267 U.S. 505 (1925).

15. The court also noted that consideration of a motion to suppress in advance of trial is consistent with its powers under state law to set aside indictments found without evidence or upon illegal evidence. People v. DuBois, 221 N.Y.S.2d 21 (Queens Cy. Ct. 1961).

or a constitutional requirement.[16] Now that the *Mapp* decision has made clear the constitutional nature of the rule, perhaps the waiver which could result from a failure to file the motion before trial should be re-examined. It is arguable that such a highly regarded right ought not be lost for mere failure to file the pre-trial motion.[17] However, if such a procedure is established by statute clearly setting forth its requisites and providing for entertainment of the motion within the court's discretion at any time, there would appear to be adequate opportunity for a defendant to assert his fourth amendment rights. Without some compulsion to dispose of the issue before trial, it would seem that the result might be undue interruption and prolongation of criminal trials.

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EXECUTORY PROCESS — ANNULMENT OF SEIZURE AND SALE FOR LACK OF AUTHENTIC EVIDENCE

More than five weeks after the sale of certain property under executory process, the plaintiffs, heirs of the deceased mortgagor, sued to annul the seizure and sale on the ground that it was not supported by sufficient authentic evidence.[1] This alleged insufficiency was caused by the failure of the clerk of court to certify the copy of the mortgage presented to the trial court. The defendant mortgagee had precipitated the sale, had purchased the property himself, and was in possession of it at the time the heirs' action was brought. He contended that plaintiffs were precluded[2] from attacking the sale because they had had notice of the proceeding and had failed to interpose an objection prior to the sale. The district court dismissed. Upon appeal to the Fourth Circuit, *held*, reversed. A mortgagor or his successors are not precluded from attacking a sale made under executory

16. See Wolf v. Colorado, 338 U.S. 25 (1949); McNabb v. United States, 318 U.S. 332 (1943).

17. See United States v. Ascendio, 171 F.2d 122 (3d Cir. 1948); Application of Bogish, 173 A.2d 906 (N.J. App. 1961).

1. There were also allegations of failure of the record to include evidence of notice of appointment of an attorney to represent the succession, and a defect in the advertisements announcing the proposed sale.

2. Actually, the defendant urged that "because of laches, the plaintiff was estopped" to attack the sale. But neither the defendant's brief nor the court's opinion seems to make any distinction between laches and estoppel. Because of the ambiguity of the opinion on this phase of the case, it is assumed for the purposes of this Note that the court meant that the plaintiff was not precluded from recovering, either from inordinate delay or because of conduct inducing detrimental reliance.