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Ellen Fairfax Warder

West Virginia University College of Law

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case. In light of United States v. Johnson, supra, and Davis v. United States, supra, it may well be that there would have been no reversible error, even if no corrective instructions had been given by the West Virginia trial courts.

Problems arising in the principal case and Griffin v. California, supra, apparently have not troubled West Virginia courts. These cases will provide guidelines for future practices incident to comment upon an accused's failure to testify in states such as Ohio and California. The problem has been alleviated in part by the recent Supreme Court ruling that there will be no retrospective application of federal standards on self-incrimination in the several states. Tehan v. United States, 86 Sup. Ct. 459 (1966). West Virginia's standards seem to be consistent with federal standards concerning comment on a defendant's failure to testify and self-incrimination. Therefore, the recent decisions should not disturb established and recognized West Virginia standards.

James Truman Cooper

Criminal Law—Use of Injunctive Proceedings to Suppress Evidence

During the course of an income tax investigation, books and records belonging to P and his wholly-owned corporation were examined by Internal Revenue agents. On several occasions special agents participated in the examination. Although the special agents were identified as such, P was unaware that their presence indicated he was undergoing a criminal tax fraud investigation. Without informing P of his constitutional guarantees of freedom from self-incrimination and right to counsel under the fifth and sixth amendments, the agents questioned P and confiscated certain books and records against receipt. P, a resident of North Carolina, instituted an action in another forum to prohibit the retention or use of the information obtained by unconstitutional means. The district court refused to grant the injunction. Held, affirmed. In the exercise of discretion, a court may properly withhold relief that might involve interference in the criminal proceedings of another forum. The proper forum for such a proceeding is the district in which the property was seized or in which the criminal trial is to be held. Smith v. Katzenbach, 351 F.2d 810 (D.C. Cir. 1965).
The fourth amendment to the federal constitution guarantees freedom from unreasonable searches and seizures. As a consequence the Supreme Court has held that a federal court could not retain illegally seized property for use as evidence after seasonable application for its return had been filed. *Weeks v. United States*, 232 U.S. 383 (1914).

The early history of suppression of evidence seems to denote the availability of two remedies—a motion for suppression of evidence and an independent equity proceeding. *Cogen v. United States*, 278 U.S. 221 (1929). The significant difference between the two remedies did not seem to rest on the form of the petition as much as the circumstances surrounding its presentation to the court. A motion filed prior to indictment was generally considered an independent equity proceeding, *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Perlman v. United States*, 247 U.S. 7 (1918), while a motion made after indictment, as in the *Cogen* case, was usually considered an interlocutory motion.

With the adoption of the Federal Rules of Criminal Procedure in 1946, however, the procedure for suppression of illegally seized evidence was codified in Rule 41(e). The rule provides that a person aggrieved by an unlawful search and seizure may petition the district court to suppress evidence and to return property on the grounds therein specified. This provision substantially embodies the practice which antedated its adoption. Only one significant alteration has been established. On the basis of the Supreme Court ruling in *DiBella v. United States*, 369 U.S. 121 (1962), a Rule 41(e) motion is of an interlocutory nature; a final decree may be rendered only when this preindictment motion is for the return of property, and the action is unrelated to any criminal proceeding.

The consequence of the adoption of Rule 41(e) and the *DiBella* interpretation is the question of whether the injunction is still an available remedy. The recent resolution of certain constitutional issues has only intensified the dispute.

Prior to 1961, illegally obtained evidence was admissible in many state courts. *Mapp v. Ohio*, 367 U. S. 643 (1961). In an effort to prevent federal officials from reaping the fruits of an illegal search and seizure in state proceedings, the Supreme Court ruled that federal courts should enjoin the use of such information by the federal officials. *Rea v. United States*, 350 U. S. 214 (1956).
The evidence sought to be suppressed in Rea was marihuana, a narcotic of a tangible nature. Although the petitioner had been successful in preventing the admission of this item in evidence at the federal level by a Rule 41(e) motion, he was still threatened at the state level by a charge of possession of narcotics in violation of New Mexico state law. As this evidence was admissible in the state proceedings, the Court held that the issuance of an injunction was a proper exercise of the federal court's supervisory power over federal officials.

The doctrine embodied in the Rea case received further consideration in 1961 when a federal court enjoined a state officer from testifying in a state proceeding. Bolger v. Cleary, 293 F.2d 368 (2d Cir. 1961). The alleged violation in the Bolger case was the failure of the federal officers to comply with Rule 5(a), which contemplates a proceeding before a commissioner immediately upon arrest. Bolger sought the suppression of evidence obtained by the officers as a result of his illegal detention. Like the Rea case, the evidence in Bolger was a narcotic.

Although the officer against whom the injunction was sought was a state official and merely a witness to the illegal detention conducted by federal officials, the court found the injunction proper. The court reasoned that such action was necessary to insure compliance with federal rules by federal officials. The effect of the earlier Supreme Court decision in Mapp was disregarded by the circuit court because the unclear scope of the doctrine rendered uncertain Mapp's applicability to the federal rules, constitutional prohibitions and administrative proceedings.

On certiorari to the Supreme Court, however, the circuit court decision was reversed. Cleary v. Bolger, 371 U. S. 392 (1963). The Court held that (in light of its recent decision in Mapp) an injunction was not the proper remedy to suppress evidence obtained in violation of the Federal Rules of Criminal Procedure. This holding was in essence a reaffirmation of Stefanelli v. Minard, 342 U. S. 117 (1951). Stefanelli is exemplary of the policy of federal non-intervention in state proceedings involving violations of the fourteenth amendment.

The theory of the dissenting opinions in Cleary hinges on the undetermined scope of Mapp. The dissenters reason that until the boundaries of Mapp are ascertained, federal courts should
regulate state officers who attempt to provide a screen for the illegal activities of federal officials.

Limitations on federal court intervention in state proceedings are inherent in the American judicial system. According to section 2283 of the Judicial Code, a federal court may interfere in state proceedings only when authorized by an act of Congress, or when necessary in aid of jurisdiction or to protect or effectuate its judgments. Moreover, the doctrine of federal abstention embody the principle that a federal court may not enjoin a state court absent a showing of great and irreparable injury. 62 COLUM. L. REV. 358 (1962). Thus, with the Cleary and Mapp decisions as precedent, it is doubtful that there will be any further federal injunctive relief in state proceedings. This is particularly true because the remedy provided by Mapp was not available at the time of the Rea decision.

Consequently, Mapp casts a shadow of a doubt on the future of Rea as persuasive authority. Rea was designed to prevent federal officials from testifying about illegally seized evidence in states where no statute prohibited its admissibility. Since the Mapp decision, the evil that Rea was designed to prevent no longer exists.

It is plausible, however, that equitable relief still may be available in states providing no adequate remedy for suppression of evidence in advance of indictment. Seemingly, a preindictment hearing on the admissibility of evidence should be a state practice as well as a federal one. When no such procedural step is available, the defendant is left solely to his objection at the trial stage and consequently is susceptible to indictment on the basis of this evidence. The stigma arising from the public accusation of an indictment can seldom be erased by acquittal. Note, Developments in the Law of Confessions, 79 HARV. L. REV. 1054 (1966).

The applicable statute in West Virginia is exemplary of the absence of statutory authority for preindictment hearings in the states. According to the West Virginia statute, no hearing on the admissibility of evidence is available in advance of indictment. W. VA. CODE ch. 62, art. 1A, § 6 (Michie Supp. 1965). The determination of this issue prior to indictment seems imperative from a tactical viewpoint since the defendant's plea is relevant to the evidence to be presented against him. Moreover, as indictments
generally are not subject to being quashed because inadmissible evidence is submitted to the grand jury, the preindictment motion may be the only means of preventing a wrongful indictment, Note, 79 Harv. L. Rev., supra at 1055.

The principal case, however, deals with the efficacy of injunctive relief on a federal level. The denial of equitable relief in this instance does not revolve on the reluctance of federal courts to enjoin a state proceeding, but rather on their reluctance to enjoin criminal proceedings in another forum. The soundness of this principle is not to be questioned; however, its applicability to the factual situation may be questioned.

Some cases have held that the suppression of evidence prior to indictment is not an instance in which equity may be invoked to stay a criminal proceeding. The relief sought is merely the return of property and the restraint of the use of certain information. The principle that equity may prevent the use of illegally obtained evidence is well established. Goodman v. Lane, 48 F.2d 32 (8th Cir. 1931).

The court in Austin v. United States, 297 F.2d 356 (4th Cir. 1961) reached a result contrary to the principal case by relying on this premise. The petitioner in Austin sought the suppression of evidence obtained in violation of the fourth and fifth amendments. The evidence was of a tangible nature only to the extent that notes were taken on statements made by the petitioner. Having refuted the contention that this was an action in restraint of criminal proceedings, the court granted the injunction on the theory that the petitioner had the right to use either a motion or an injunction to have his claim adjudicated. The court's recognition of the injunction and motion procedures as concurrent remedies makes the decision valuable precedent.

Despite the holding in Austin, the equitable remedy for suppression of evidence is not firmly established. Historically, equity courts have not exercised their discretionary powers when an adequate remedy is available at law. In this instance the motion procedure seems adequate except in cases like Bolger where the state has no procedure for preindictment determination of the admissibility of evidence.

The most favorable climate for the use of the injunction seems to lie in the area of statements and confessions obtained in
violation of the fifth amendment. The fifth amendment provides that no person shall be compelled to testify against himself in a criminal proceeding.

In a majority of jurisdictions, pretrial motions to suppress illegally obtained confessions have not been entertained. The justification for such action has been that the trial was the appropriate forum for the resolution of factual disputes concerning the voluntariness of a confession. Note, 79 HARv. L. REV., supra 1054.

Suppression of a confession by injunction was held proper in In re Fried, 161 F.2d 453 (2d Cir. 1947). Although the second circuit recognized the use of the injunction for such a purpose, federal courts are split on this issue. Justification for equitable relief in this area seems to rest on the prevailing controversy in the circuits concerning the scope of Rule 41(e). In Biggs v. United States, 246 F.2d 40 (6th Cir. 1957), the court held that Rule 41(e) does not apply to violations of the fifth amendment. This decision was based on the absence of any provision in the rule regarding suppression of evidence of this type. The court held that the plaintiff's only remedy was an objection to the admission of the evidence at the trial stage. The sixth circuit also held that the sole authority for the suppression of evidence is found in Rule 41(e) and that its operativeness depends upon a violation of constitutional rights under the fourth and not the fifth amendment. United States v. Klapholz, 230 F.2d 494 (2d Cir. 1956).

In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court determined that verbal evidence flowing from an illegal search and detention is no less the "fruit" of federal illegality than objects of a more tangible nature. The effect of this holding on the scope of Rule 41(e) is also undetermined. However, it would seem that until such a determination is made, equitable relief may be the vehicle for suppression of evidence obtained in violation of the fifth amendment. To allow the return of an indictment based on an illegally obtained confession is as wrongful as allowing the return of an indictment based on evidence of a more tangible nature. By preventing an indictment based on evidence that will not be admissible at the trial, the courts can avoid damage to the reputation of the individual.
Thus, the use of the injunction for the suppression of evidence has become limited by recent constitutional developments. Its future in some areas remains uncertain. The success of the remedy will rest ultimately on the interpretation given the scope of Rule 41(e). Similarly, the granting of equitable relief in situations like that in Bolger v. Cleary, supra, may depend upon the interpretation of state statutes providing no preindictment method for suppressing evidence.

Ellen Fairfax Warder

Evidence—Use of Learned Treatises in Cross-Examination of Expert Witnesses

An action was brought on behalf of a minor, by his father and next friend, to recover damages for allegedly negligent medical and hospital treatment which necessitated the amputation of the minor's right leg below the knee. At the trial, the court permitted cross-examination of the defendant's expert witnesses concerning the views expressed in recognized treatises in their fields, although the experts had not relied on these treatises as bases for their views on direct examination. The trial court rendered a verdict for the plaintiff. Held, affirmed. The rule that an expert can be cross-examined only about those texts upon which he expressly bases his opinion is not supported by sound reasoning. Expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities expressed in treatises or periodicals written for professional colleagues. Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253 (Ill. 1965).

It is the general rule that treatises are not admissible for substantive evidence purposes. This is due primarily to the fact that they are composed of opinions and views of persons not under oath and not subject to cross-examination and thus in violation of the hearsay rule. 6 Wigmore, Evidence §§ 1690-92 (3d ed. 1940).

The same reasons for excluding books on direct evidence have been carried over into the area of cross-examination of expert witnesses. It is maintained that this would enable the cross-examiner to present the contents of the treatise to the jury as