William & Mary Law Review

Volume 12 (1970-1971)
Issue 4

Article 13

May 1971

Criminal Law - Exploitation of Illegal Arrest. United States v. Edmonds, 432 F.2d 577 (2d Cir. 1970)

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used were "validated," in part, by their relationship to necessary job skills.[29]

The *Griggs* case gives the first useful judicial interpretation of what tests may or may not legally be used in a merit system scheme of promotion. Section 703(h) may be violated even when no intent to discriminate on a racial basis is shown.[30] If the educational requirement or aptitude test is not shown to be related to necessary job skills, and if it results in discrimination against blacks, it is unlawful.[31] This holding gives judicial support to the Equal Employment Opportunity Commission's guideline on the subject,[32] and requires that employers be prepared to demonstrate the relevance of the tests to the qualifications for the job for which they are required. This is particularly true if proportionately more whites than blacks meet the requirements. From the tenor of the opinion, it is fair to predict that the *Griggs* rationale will be extended to pre-employment tests when such a case arises.

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Criminal Law—EXPLOITATION OF ILLEGAL ARREST. *United States v. Edmonds*, 432 F.2d 577 (2d Cir. 1970).

After making a lawful arrest, FBI agents were assaulted by an angry mob and forced to let their prisoner escape. The following day other agents who had not been involved in the affray arrested four defendants on the pretext of failure to have Selective Service cards in their possession.[1] Defendants were then escorted to FBI headquarters in the hope that they could be identified by the victims of the assault. The ensuing identification resulted in courtroom identification testi-

29. *Id.* at 78. The court found that the tests were validated as plaintiff argued they must be, by the company officials' evaluation and a showing that they were job-related. *Id.* at 76, 78. The court also said the tests need not be validated anyhow, since plaintiff had not shown a discriminatory result. *Id.* at 77. The injunction sought against the use of the tests was denied. *Id.* at 119.

30. 91 S. Ct. at 853.

31. *Id.* at 856.

32. § 1607.4(c), 35 Fed. Reg. 12333 (1970) demands that employers keep "data demonstrating that the test is predictive of . . . important elements of work behavior . . . relevant to the job. . . ."

1. Military Selective Service Act, 50 U.S.C.A. APP. § 462(b)(6) (1968). Testimony showed that the government had never prosecuted for inadvertent failure to have draft cards on an individual's person, and subsequent actions at FBI headquarters indicated they never intended to prosecute in this instance. United States v. Edmonds, 432 F.2d 557, 582 (2d Cir. 1970).

mony and conviction for impeding a lawful arrest,[2] aiding in an escape,[3] and assault.

On appeal to the United States Court of Appeals for the Second Circuit, the defendants contended that the identification testimony should have been excluded as the fruit of an unlawful arrest. The government argued that the testimony was admissible since it was derived from a source independent of the arrest.[4] The court of appeals, however, determined that the arrests were a deliberate pretext for purposes of securing in-court testimony and, therefore, a violation of the fourth amendment.[5] In reversing the convictions, the court concluded that where the government purposefully exploits the fruits of an illegal arrest, evidence derived therefrom must be excluded in order to serve the deterrent purpose of the exclusionary rule.[6]

In 1886, the exclusionary rule was first applied in *Boyd v. United States*[7] when the Supreme Court rejected the common law rule[8] of admissibility in federal courts and held that evidence seized in violation of the fourth amendment could not be used against an accused.[9] In *Weeks v. United States*[10] the Court explicitly stated what had been implied in *Boyd;* the protection given by the fourth amendment would

2. 18 U.S.C. § 111 (1964).

3. 18 U.S.C. § 752(b) (1964).

4. 432 F.2d at 582.

5. 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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

Illegality *vel non* was not an issue since the Government had conceded that the arrest was illegal. 432 F.2d at 581.

6. *See* notes 7-20 *infra,* and accompanying text.

7. 116 U.S. 616 (1886).

8. *See, e.g.,* Adams v. New York, 192 U.S. 585 (1904); Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841).

9. The basis of the exclusionary rule was also predicated upon the fifth amendment and its intimate relationship to the fourth amendment.

> [The] "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

116 U.S. at 633. *See also* Counselman v. Hitchcock, 142 U.S. 547 (1892).

10. 232 U.S. 383 (1914).

be meaningless if evidence seized as a result of an illegal search and seizure was admitted at trial.[11] The rule was justified on the basis that no other practical means was sufficient to enforce constitutional rights or to deter illegal police methods.[12] From this foundation, the rule has been expanded into a vast and controversial[13] area of constitutional law which requires the exclusion of evidence secured by illegal arrests,[14] lineups,[15] detentions,[16] entries,[17] interrogations,[18] wiretappings,[19] and confessions.[20]

In *Silverthorne Lumber Company v. United States*,[21] where the "fruits of the poisonous tree" doctrine was first enunciated, the Supreme Court postulated that in addition to illegally secured evidence any knowledge derived from that evidence should be excluded.[22] The Court was careful to point out, however, that knowledge gained legally from an independent source was admissible.[23] *Nardone v. United States*[24] formulated a test to distinguish derivative evidence from evidence secured from an independent source. Borrowing from the proximate cause concept in the law of torts,[25] the Court suggested that derivative evidence would be independent of the "poisonous tree" when the causal connection became "so attenuated as to dissipate the taint." [26] Applying

11. The Court also pointed out that illegal police activities "should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution. . . ." *Id.* at 392.

12. *See, e.g.*, Nueslein v. District of Columbia, 115 F.2d 690, 695 (D.C. Cir. 1940); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 13-16 (1966); Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579 (1968).

13. *See, e.g.*, J. LANDYNSKI, *supra* note 12, at 84-86.

14. Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968); Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961).

15. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

16. Davis v. Mississippi, 394 U.S. 721 (1969).

17. Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940).

18. Miranda v. Arizona, 384 U.S. 436, 463 (1966).

19. Nardone v. United States, 308 U.S. 338 (1939).

20. Miranda v. Arizona, 384 U.S. 436 (1966).

21. 251 U.S. 385 (1920).

22. Mr. Justice Holmes, speaking for the Court, reasoned that to allow the government to benefit from its own wrong "reduces the Fourth Amendment to a form of words." *Id.* at 392.

23. *Id.*

24. 308 U.S. 338 (1939).

25. *See, e.g.*, Bernstein, *The Fruit of the Poisonous Tree: A Fresh Appraisal of the Civil Liberties Involved in Wiretapping and Its Derivative Use*, 37 ILL. L. REV. 99, 106 (1942).

26. 308 U.S. at 341.

this test in *Costello v. United States*,[27] for example, the Supreme Court refused to exclude a voluntary confession made after illegal wiretapping had prompted the petitioner's appearance before a grand jury.[28]

The proximate cause test was clarified in *Wong Sun v. United States*[29] where the Court required exclusion only if the derivative evidence was obtained by exploiting the primary illegality.

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." [30]

In *United States v. Wade*[31] the Supreme Court remanded the case with directions to apply *Wong Sun* to determine the effect of an unconstitutional lineup on subsequent in-court identification testimony. The Court indicated that if the testimony was predicated upon an illegal lineup it must be excluded, but if a definite image of the accused was independently formed in the mind of the witness, the testimony would be admissible.[32]

United States v. Edmonds[33] did not present merely a question of evidence derived from an illegal police activity.[34] If that had been the sole issue, an application of *Wade* would have permitted the admission of the testimony on the basis that the identification at FBI headquarters was not relied upon to bolster the agents' image of the defendants.[35] The objection in *Edmonds* was directed at the exploitation of evidence derived from an illegal arrest rather than at the use of otherwise reliable testimony.[36] The court felt that exclusion of the identification testimony was compelled by the deterrent purpose of the

27. 365 U.S. 265 (1961).
28. *Id.* at 280.
29. 371 U.S. 471 (1963).
30. *Id.* at 487-88, *quoting from* MAGUIRE, EVIDENCE OF GUILT 221 (1959).
31. 388 U.S. 218, 241-43 (1967).
32. *Id.* at 239-42.
33. 432 F.2d 577 (2d Cir. 1970).
34. *Id.* at 583.
35. *Id.* at 582.
36. *Id.* at 584.

exclusionary rule,[37] and that any other result would permit unconstitutional dragnet arrests simply for the purpose of holding a lineup.[38] This decision is a logical extension of the rule promulgated in *Wong Sun* and will not preclude the use of identification testimony resulting from an arrest made in good faith which turns out to have been illegal because of a lack of probable cause.[39] Patently, exclusion of such evidence would not serve the deterrent purpose of the exclusionary rule.[40] The decision, however, will preclude the use of evidence secured by an arrest for the very purpose of exhibiting a prisoner before the victim with the intent of having a resulting identification duplicated at trial. Such an arrest is a violation of the fourth amendment,[41] and the use of the evidence derived from it is as much an exploitation of the "primary illegality" as where a defendant is arrested without probable cause in the expectation that a search will yield evidence, and the illegally seized evidence is introduced at trial.[42]

WOODROW TURNER, JR.

Evidence—PRIVILEGED COMMUNICATIONS—ATTORNEY-CLIENT PRIVILEGE IN STOCKHOLDERS' SUIT. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3411 (U.S. March 23, 1971).

Stockholders of the First American Life Insurance Company brought a class action against the corporation and its officers alleging violations of federal and state securities laws and common law fraud. The cor-

37. *Id.* The court, further, felt they would be required to exclude the testimony as an exercise of their supervisory power. 432 F.2d at 585. *See also* Terry v. Ohio, 392 U.S. 1, 13 (1968); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Weeks v. United States, 232 U.S. 383, 392 (1914).

38. 432 F.2d at 584 n.7, quoting from Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 535 (1963).

39. *Id.* at 584.

40. One commentator has suggested that the following question should be asked to determine whether the exclusionary rule applies.

> What goals do policemen have in mind in acting in this improper way? What unexpected fruits . . . could or should be expected of the impropriety, according to our experience? Is the exclusionary rule invoked in this case calculated to deter such impropriety? Will, in fact, exclusion in this case help to serve the policy ends of the rule?

Ruffin, *Out On a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. REV. 32, 38 (1967).

41. *See* note 5 *supra.*

42. 432 F.2d at 584.