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Constitutional Law - Search and Seizure - "Fruit of Poisonous Tree" Doctrine - Jacobs v. Warden, 367 F.2d 321 (4th Cir. 1966)

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appear that these powers would be similarly restricted.²⁸ Cases of this nature have been rare. Perhaps this ruling will provide the foothold on which other related claims will find their bearings, thereby leading to a more explicit definition of the law.

Karen Atkinson

Constitutional Law—SEARCH AND SEIZURE—“FRUIT OF POISONOUS TREE” DOCTRINE. Petitioner Jacobs had been convicted in the state court of armed robbery on a plea of guilty after he and his co-defendants had signed a joint confession acknowledging their respective parts in a holdup. Jacobs originally had been arrested without a warrant for his part in the robbery solely on the basis of a confession of his co-defendant Kelly. In subsequent habeas corpus proceedings the Federal District Court found that since Kelly’s arrest without a warrant had been without probable cause, his confession was involuntary; and therefore, inadmissible against him.¹ On the basis of these facts Jacobs

from completing his duties), even though no presentment or indictment was found against him. It appears that there was no law under which he could have been prosecuted.

The Senate during the debates on the admission of Senator Smoot of Utah, found itself in a situation similar to the one the Georgia House faced with the plaintiff. Smoot met all the written qualifications, but because he was one of the Apostles of the Mormon Church, there was strong feeling that he would be unable to fulfil his oath of office as a Senator. (He was a polygamist, but polygamy was not yet against the law.) During the course of debates on his qualifications, it was finally determined to seat him and then discuss the possibility of expelling him. Once seated, however, the Senate refused to expel him. *HIND’S PRECEDENTS* Vol. I, 481-484 (1907).

A modern counterpart is found in the position of the House of Representatives with regard to seating Adam C. Powell. There is some feeling that he should be seated and then censured by some means, perhaps expulsion.

An important question left unanswered is: if Bond had been a member of the House when the statements were made and the House had then expelled him, would this action be subject to review by the courts?

28. The case is as noteworthy for what it assumes as for what it says. It does not discuss the difference between political and civil rights; it makes the direct statement, supported by the First Amendment, that a state cannot require a higher degree of loyalty from elected officials than from ordinary citizens; and it neglects the line of authority holding that the legislature alone has the power to judge the qualifications, returns, and elections. Because the Court did not include its reasoning, but merely its conclusions on these subjects, the importance of this case as a precedent is questionable.

1. The District Court determined that the arresting officers had made the arrest on the basis of “leads” given them by an informer. When questioned by the court as to the identity of the informer the police were unable either to establish his identity or to vouch for his reliability, and the court ruled that such a “lead” could not be considered sufficient probable cause for arrest.

contended that the product of Kelly's unlawful arrest could not be used as the grounds for his arrest and subsequent confession. While finding that Kelly's confession was the product of an unlawful arrest, the court went on to rule that Jacobs' arrest and confession were free of the primary taint of illegality, and it denied his petition for relief.² From this decision petitioner appealed.³

In affirming the lower court's decision, the Court of Appeals, Fourth Circuit, held that while a victim of an illegal arrest may claim immunity from the consequences of that arrest, such protection may not be extended to cloak strangers with similar immunities.⁴

Jacobs, in maintaining that his constitutional rights had been violated by the use of Kelly's involuntary confession, attempted to bring his case within the prohibitions of the "fruit-of-the-poisonous-tree" doctrine.⁵ As the result of Supreme Court decisions,⁶ evidence obtained in the course of unlawful searches and seizures is inadmissible as a violation of the Fourth Amendment.⁷ The essence of the "poisonous tree" doctrine, which forms the basis of the petition in the instant case, is that illegally obtained evidence is beyond the reach of the authorities whether it is used by the prosecutor in the trial or by the police as a necessary part of the investigation.⁸ The Supreme Court has held that not only is the Government precluded from basing a conviction on illegally obtained evidence, but also is forbidden any use of evidence derived solely from the product of the unlawful search and seizure.⁹

2. Kelly v. Warden 230 F. Supp. 551 (D. Md. 1964).

3. Jacobs v. Warden 367 F.2d 321 (4th Cir. 1966).

4. *Id.* at 323.

5. Nardone v. United States 308 U.S. 338, 341 (1939).

6. The theory that evidence may be excluded solely on constitutional grounds began with the decision in Weeks v. United States 232 U.S. 383 (1914). Subsequent decisions based on this issue have been Silverthorne Lumber Co. v. United States 251 U.S. 385 (1920), Gouled v. United States 255 U.S. 298 (1921), Olmstead v. United States 277 U.S. 438 (1928), and Nardone v. United States 308 U.S. 338 (1939). The decisions have received congressional approval in FED. R. CRIM. P. 41 (e).

7. U.S. CONST. amend. IV: "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 persons or things to be seized."

8. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Silverthorne Lumber Co. v. United States 251 U.S. 385, 392 (1920).

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

While demanding from the police full recognition of the constitutional rights of the individual, the Supreme Court never intended the exclusionary rules to so handicap law enforcement authorities that one mistake on their part would render conviction impossible.¹⁰ In past decisions the Court limited the immunity of exclusion to those parties whose rights were violated as the direct result of the unlawful arrest or search and seizure while excluding third parties who may have been adversely effected by the police conduct but who were not the victims of the overt illegality.¹¹ Not all illegally obtained evidence must be ruled inadmissible: if the authorities can prove the evidence through an "independent" source, the relation between the illegality and the evidence as so proven may be regarded as so remote as not to effect its admissibility.¹²

By the recent decision in *Wong Sun v. United States*¹³ the Supreme Court "entered once again the bloody war fought over the exclusion of illegally obtained evidence"¹⁴ by holding that confessions obtained during unlawful detentions may be considered fruits of the poisonous tree.¹⁵ The result of this decision has been to bring verbal evidence in the form of confessions and admissions as well as random conversations within the purview of the poisonous tree doctrine if it is the product of an unlawful arrest or entry.¹⁶

While bringing verbal evidence within the operation of the exclusionary rule the Court was careful to point out that this application also had its limitations.¹⁷ Verbal evidence, by its very nature, is not a limited

10. "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which the evidence in the Government's possession was obtained and provide himself with a shield against contradictions of his untruths." *Walder v. United States* 347 U.S. 62, 65 (1954).

11. *Goldstein v. United States* 316 U.S. 114 (1942).

12. *Supra* note 9 at 341. "As a matter of good sense, however, such connection [between the illegality and the evidence as so presented] may have become so attenuated as to dissipate the taint."

13. *Wong Sun v. United States* 371 U.S. 471 (1963).

14. *Rogers v. United States* 330 F.2d 535, 540 (1964).

15. *Supra*, note 13.

16. *Supra*, note 13 at 485. "Verbal evidence which derives so immediately from an unlawful entry or unauthorized arrest . . . is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence."

17. *Supra* note 13 at 487-488. "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 estab-

or set quantity. Law enforcement officers are unable to predetermine the extent of a disclosure and should not be denied the use of the information gained if that particular source is subsequently denied them.¹⁸ The Supreme Court recognized this problem and left it to the trial courts to determine whether the information was an "exploitation" of the initial illegality or the product of an independent source.¹⁹ The rights of a third party, which would seem to take on added significance when a confession or admission is involved, are not disturbed so long as the party would have no cause to object to the use of the confession, in his own right, at the trial.²⁰ Here the Circuit Court, in upholding the District Court, placed great emphasis on the fact that the exclusionary rule provided relief to the victim of the illegal search or detention, but had not been extended to third parties.²¹

lishment of the primary illegality, the evidence to which instant objection is made has been come at by the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' *MAGUIRE, EVIDENCE OF GUILT (1959)*."

18. *Supra*, note 8 at 392. [T]his does not mean that the facts thus obtained become sacred and inaccessible. If the knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

19. *Supra*, note 17.

20. *Supra*, note 11 at 121. "No court has ever gone so far in applying the implied sanction for violation of the Fourth Amendment. While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized. . . . We are of the opinion that, even though the use made of the communications by the prosecuting officers to induce the parties to them to testify was held a violation of the statute, [47 U.S.C. §. 501, Communications Act of 1934] this would not render the testimony so procured inadmissible against a person not a party to the message."

21. *Supra*, note 3 at 323. "It [the exclusionary rule] has never been extended to cloak strangers to the unlawful search with absolute or conditional immunities." Kelly was the direct victim of the arrest and the refusal to use his confession was "sufficient recompense" for the wrong done to him. It is at this point that the decision had to be made whether the arrest and confession of Jacobs was so much the product of the unlawful arrest as to be wrongfully obtained, or whether the connection between Kelly's arrest and Jacobs' confession was so slender as to be negligible. The Court of Appeals reached its decision by considering the character of Kelly's confession and its effects on Jacobs' rights, and the character of Jacobs' own confession. *Supra*, note 3 at 323.

Kelly's confession was ruled involuntary almost wholly on the error committed by the police in failing to document the source of their information and not on the basis of error in obtaining the confession. At the time it was given, Kelly's confession was regarded as completely trustworthy by the police and the District Court ruled that error in the arrest should not affect the information derived from the otherwise voluntary confession. *Supra*, note 2. When confronted by the police, Jacobs gave no

The Circuit Court reasoned that even though there would have been no probable cause to arrest, or even suspect, Jacobs without Kelly's "involuntary" confession, Jacobs did not suffer any deprivation of his constitutional rights through the use of the confession.²² His own confession given so soon after his arrest lends support to this view. Yet Jacobs would not have confessed, at that time at least, had not it been for the involuntary confession. By the present decision the Circuit Court of Appeals has indicated that a narrow standard²³ will be applied in deciding just where the point of attenuation falls in the connection between the primary illegality and the independent source. In effect this raises the presumption that notwithstanding the new thrust in the area of the "poisonous fruits" doctrine continued leeway will be allowed law enforcement officials and prosecutors in the acquisition and introduction of evidence within the Fourth Circuit.

Gilbert A. Bartlett

Constitutional Law — FREE SPEECH — DRAFT CARD BURNING. In *United States v. Miller*,¹ David J. Miller appealed from a judgment of the U.S. District Court for the Southern District of New York,² convicting him of knowingly destroying his draft card in violation of Section 12(b)(3) of the Universal Military Service and Training Act as amended in August, 1965.³

Appellant, a 24-year-old member of the New England Committee

indication that he had reason to object to the substance of the allegations. At the time of his arrest he failed to deny the information and within a short time of his arrest he made a complete confession in his own right.

22. *Supra*, note 3 at 323.

23. California favors the liberal approach to the exclusionary rule on the grounds that to limit immunity to the person actually wronged is to condone, if not encourage, police illegality by permitting the authorities to trade the release of the person who confesses under duress for the conviction of those implicated by the confession. *People v. Martin* 290 P 2d 855 (1955). The Supreme Court's position on this approach may be indicated by the fact that *Martin* was cited by the dissent in *Wong Sun* but on an entirely unrelated point. For a discussion of the problem presented by implication in *Wong Sun* see Broeder, *Wong Sun v. United States, A Study in Faith and Hope* 42 Neb. L. Rev. 483 (1963), Kamisar, *Illegal Searches and Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure* 1961 Ill. L. For. 78 (1961). For an opposing view, and one which was favorably cited in *Kelly*, see *Prescoe v. State* 231 Md. 486, 191 A2d 226 (1963).

1. 367 F.2d 72 (2nd Cir. 1966), *cert. denied*, *Miller v. U.S.*, 87 S.Ct. 855.

2. *U.S. v. Miller*, 249 F. Supp. 59.

3. Universal Military Service and Training Act, 62 Stat. 622, 50 U.S.C. App. § 462(b)(3); amended by 79 Stat. 586.