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Problems Relating to Admissibility of Evidence Challenged as Indirect Result of Illegal Search

NOTE

EVIDENCE

PROBLEMS RELATING TO ADMISSIBILITY OF EVIDENCE CHALLENGED AS INDIRECT RESULT OF ILLEGAL SEARCH

Krulewitch was indicted on charges of violating and conspiring to violate the Federal White Slave Traffic Act. The trial court granted his motion to suppress evidence obtained through an illegal search of his apartment. At the trial defense counsel objected to admission of certain additional items of evidence on the ground that they were the result of clues obtained in the illegal search. So far as appears, defense counsel did not offer any testimony to support his objections. Upon assurance by the prosecuting attorney at each objection that the offered evidence had an origin independent of the illegal search, the trial court overruled the objections. From a conviction Krulewitch appealed, assigning as error, *inter alia*, that the trial court before admitting the challenged evidence failed to take testimony as to its origin. The circuit court of appeals affirmed, holding that under the circumstances the trial court's action did not amount to an abuse of discretion. *United States v. Krulewitch*, 167 F.2d 943 (C. C. A. 2d 1948).

The case suggests an inquiry into several of the problems which confront a trial court when evidence is objected to on the ground that it is derived from evidence or clues already established to have been directly obtained by illegal means.[1] Chief among these problems is the question as to

1. The inquiry is relevant, of course, only in the federal courts and in that substantial number of state courts where it is held that, subject to certain exceptions, evidence obtained by illegal means is not admissible against the accused in a criminal trial. The common law rule of evidence is that its admissibility is not affected by the illegality of the means through which it is procured. Adams v. New York, 192 U. S. 585 (1904); 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940); Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COL. L. REV. 11 (1925). The trend seems to be toward inadmissibility. See Notes, 88 A. L. R. 348 (1934) and 52 A. L. R. 477 (1928). The rule of inadmissibility has its roots in the soil of the Bill of Rights. Boyd v. United States, 116 U. S. 616 (1886); Weeks v. United States, 232 U. S. 383 (1914); Gouled v. United States, 255 U. S. 298 (1921); Agnello v. United States, 269 U. S. 20 (1925). The rule flourished particularly during the Prohibition Era when unlawful searches of the property of suspected

who bears the burden of proof on the issue of derivative taint.

It fell to the second *Nardone* case[2] to enunciate fully the expansion of the rule against the admissibility of illegally obtained evidence to exclude also evidence which, though not directly obtained by illegal means, is derived from information secured by the illegal act.[3] In the course of that opinion the Court, speaking through Mr. Justice Frankfurter, made some broad and general observations apparently intended for the guidance of trial courts in dealing with objections to evidence on the ground of derivative taint. The Court said that the burden is on the accused in the first instance to prove that illegal means have been resorted to by the prosecution.[4] When that has been done, the trial court must give to the accused opportunity, "however closely confined," to prove that "a substantial portion of the case against him is a fruit of the poisonous tree," leaving "ample opportunity to the Government to convince the trial court that its proof had an independent origin."[5] The Court then qualified these observations by stating that a trial court need not entertain any such objection unless satisfied with its timeliness.[6] Nor, it was said, need the trial court

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violators of the Volstead Act, with accompanying seizures of articles of evidentiary value, were commonplace. See Fairchild, *Freedom From Unreasonable Search and Seizure*, 25 MARQ. L. REV. 13, 14 (1940); Note, 42 ILL. L. REV. 822 (1948). Indiana has adopted the inadmissibility rule. Shuck v. State, 223 Ind. 155, 59 N. E.2d 124 (1945); Smith v. State, 202 Ind. 684, 177 N. E. 898 (1931); Dumas v. State, 197 Ind. 123, 150 N. E. 24 (1925); Flum v. State, 193 Ind. 585, 141 N. E. 353 (1923); Callender v. State, 193 Ind. 91, 138 N. E. 817 (1922). See Gilliom, *Searches and Seizures in the Administration of the Criminal Law of Indiana*, 1 IND. L. J. 65 (1926).

2. Nardone v. United States, 308 U. S. 338 (1939).
3. The expansion of the rule had previously been established. Silverthorne Lumber Company v. United States, 251 U. S. 385 (1920); Watson v. United States, 6 F.2d 870 (C. C. A. 3d 1925); Flum v. State, 193 Ind. 585, 141 N. E. 353 (1923).
4. Nardone v. United States, 308 U. S. 338, 341 (1939). This rule had also previously been established. United States v. Phillips, 34 F.2d 495 (App. D. C. 1929); Samson v. United States, 26 F.2d 769 (C. C. A. 1st 1928). See Gilliom, *supra* note 1, at 72.
5. Nardone v. United States, 308 U. S. 338, 341 (1939).
6. *Id.* at 341, 342. Subject to the exceptions noted below, the general rule in the federal courts is that such an objection, in order to satisfy the requirement of timeliness, must be made before trial in the form of a motion to suppress. Weeks v. United States, 232 U. S. 383 (1914); Silverthorne Lumber Company v. United States, 251 U. S. 385 (1920); Dunn v. United States, 98 F.2d 119 (C. C. A. 10th 1938); United States v. Wernecke, 138 F.2d 561

sustain the objection unless satisfied with the "solidity" of the accused's claim of taint.[7] Finally, the Court recognized that such "rules" are not capable of being mechanically applied, but leave to the trial court "a well-established range of judicial discretion, subject to appropriate review on appeal."[8]

Since the second *Nardone* case there has been little judicial comment on the application of the propositions there laid down. Only two cases seem to bear directly on the problem of burden of proof.

In *United States v. Goldstein*[9] the trial court admitted evidence over objection by accused that it had been derived from illegal "wire tapping" already established to have been committed by Government agents. On appeal the Second Circuit Court of Appeals discussed the doctrine of the second *Nardone* case in some detail and interpreted it as placing

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(C. C. A. 7th 1943), *cert. denied*, 321 U. S. 771 (1944). See Arnold, *Search and Seizure Problems*, 16 TENN. L. REV. 291, 301 (1940). The rule is subject to two exceptions. First, objection at trial is timely if defendant did not previously have knowledge that the evidence would be offered. Gouled v. United States, 255 U. S. 298 (1921). See Rosenzweig, *The Law of Wire Tapping*, 32 CORN. L. Q. 514, 522 (1947). Second, if the offered evidence is patently and admittedly illegally obtained, objection at trial is not too late. Agnello v. United States, 269 U. S. 20, 34 (1925). See Rosenzweig, *supra*; Note, 1 U. OF CHI. L. REV. 120, 123 (1933). The federal courts have in other ways shown a tendency to relax the general rule. Amos v. United States, 255 U. S. 313 (1921). *See* United States v. Di Re, 159 F.2d 818, 820 (C. C. A. 2d 1947), *aff'd*, 332 U. S. 581 (1948); FED. R. CRIM. P., 41 (e); Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472, 489 (1948). There is a sharp conflict of authority in the state courts, some of them refusing to follow the general federal rule and holding that objection is timely when made at trial. Youman v. Commonwealth, 189 Ky. 152, 224 S. W. 860 (1920). For collected cases see Notes, 24 A. L. R. 1408 (1923), 32 A. L. R. 413 (1924), 41 A. L. R. 1149 (1926), 52 A. L. R. 483 (1928), 88 A. L. R. 359 (1934), 134 A. L. R. 826 (1941), 150 A. L. R. 573 (1944). Although the law in Indiana on timeliness is not entirely clear, it seems probable that Indiana, contra to the federal rule, now holds that objection is timely when made at trial. Shuck v. State, 223 Ind. 155, 59 N. E.2d 124 (1945); Karlen v. State, 204 Ind. 146, 174 N. E. 89 (1930). *See* Heyvert v. State, 207 Ind. 654, 656, 194 N. E. 324, 325 (1935).

7. ". . . mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence in the Government's possession . . . . Therefore claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity . . . ." Nardone v. United States, 308 U. S. 338, 342 (1939).
8. *Ibid.*
9. 120 F.2d 485 (C. C. A. 2d 1941).

upon the prosecution the burden of proof on the issue of derivative taint. Judge Learned Hand, speaking for the court, clearly indicated that failure to place the burden there would ordinarily constitute reversible error.[10]

On certiorari to the Supreme Court[11] the majority opinion expressly reserved the question of burden of proof as unnecessary to decision.[12] In the dissenting opinion, however, Mr. Justice Murphy, speaking for himself, Stone, C.J., and Frankfurter, J., treated the subject at length and ratified the construction put upon the *Nardone* doctrine by the lower court.[13]

The only other judicial interpretation of the doctrine lies in the second *Nardone* case itself when remanded to the district court. There the court, "following the direction of the Supreme Court on . . . appeal," held a preliminary hearing in which the prosecution accepted the burden of proving that none of the evidence which it proposed to use, and which it later did use, had been the result of leads from the illegally obtained information.[14]

Thus, though the Supreme Court has not directly passed upon the question, there is respectable authority that the "burden of proof" does devolve upon the prosecution.[15] The precise nature of this burden and the chronological point at which it arises are subjects yet to be investigated. But assuming an illegal procurement of some evidence by the prosecution to have been established, it is clear that this

10. *Id.* at 488. Conviction was, however, affirmed on the ground that since defendant was not a party to the "tapped" conversations, he had no standing to object to the evidence.

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

12. *Id.* at 117.

13. After stating that the trial judge had erroneously put the burden on the accused, Justice Murphy continues: "For after an accused sustains the initial burden, imposed by Nardone v. United States, 308 U. S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that its proof had an independent origin." Goldstein v. United States, 316 U. S. 114, 124, n. 1 (1942). The dissent then quotes with approval Judge Learned Hand's language in the court below. *Ibid.*

14. *See* United States v. Nardone, 127 F.2d 521 (C. C. A. 2d 1942).

15. This conclusion has also been recommended elsewhere: "It would be reasonable to expect that in such cases the burden should be on the prosecution to show that the evidence was not obtained through the information learned as a result of the illegal search." Atkinson, *supra* note 1, at 25.

fact alone does not make the prosecution's entire case prima facie inadmissible. Defendant's objection to the evidence he seeks to suppress must be timely. Presumably he must first satisfy the court on this score before any such objection need even be the subject of an inquiry. In addition there is imposed another duty on the accused if he is to support his claim of taint. He must, in the words of Judge Hand, show "some use" of the illegal activity.[16] Or to translate this language into general terms, it is a fair statement that he must show a probable, or at least a possible, causal connection between the illegal activity and the evidence sought to be suppressed.[17]

So despite judicial utterances to the effect that the burden is on the prosecution to show that its proof had an independent origin, it is manifest that whatever burden is eventually to be borne by the prosecution does not arise at the moment of objection. Serious obstacles must first be overcome by the defendant.

Assuming the accused to have satisfied these two primary requirements, either by process of logical argument or by the introduction of evidence,[18] what can be said as to the subsequent procedure? It seems fairly certain, in the present state of the law, that the prosecution must now come forward with some evidence.

The exact nature of the duty falling upon the prosecution at this point is open to debate. One defensible definition of the term "burden of proof" is that it amounts to a duty to establish a fact in issue by a preponderance of the

16. United States v. Goldstein, 120 F.2d 485, 488 (C. C. A. 2d 1941). Compare the language of the second *Nardone* case, to the effect that defendant's claim must have "solidity." See note 7 *supra.*

17. This interpretation is supported by another statement by Judge Hand in the same opinion: ". . . after the accused had proved that the 'taps' had been made and had to some extent been used to break down Messman and to a less degree Garrow [two witnesses who the defense contended were induced to testify for the prosecution upon being confronted with the "taps"], the burden fell upon the prosecution." United States v. Goldstein, 120 F.2d 485, 488 (C. C. A. 2d 1941).

18. It seems fairly clear that the trial court must allow the accused to introduce at least a limited amount of extrinsic evidence to establish the "solidity" of his claim of taint. Nardone v. United States, 308 U. S. 338, esp. 341 (1939). This statement should be qualified, however, in the case of repeated but subsequently unsupported objections, the problem of which will be more fully discussed *infra.*

evidence.[19] If courts always used the term in this sense, this phase of the inquiry could end here. However, "burden" or "burden of proof" is quite often used to describe the duty to proceed with the evidence.[20] It is at least arguable that the courts have used these terms in the latter sense in relation to the instant problem. If this is true, the duty falling upon the prosecution would, in theory at least, be considerably less onerous than under the definition first ventured above.[21]

It should be here noted, however, that this concern with the nature of the prosecution's burden may be largely an academic one. While from a substantive point of view the law may require the judge to be cognizant of what in theory the prosecution's duty is, at the same time it is apparent that in practice any subtle standard of the quantum of evidence required of the prosecution would probably be given lip service only. We are dealing with a collateral hearing addressed to the judge on an issue for his decision alone.[22] The jury is not involved.[23] Assuming some pro-

19. This definition is often said to be the proper use of the term. See Ray, *Burden of Proof and Presumptions*, 13 TEX. L. REV. 33 (1935). Professor Wigmore's now classic description is "risk of non-persuasion." 9 WIGMORE, EVIDENCE § 2485.

20. The term "burden of proof" is notorious for its vacillating character and has long been a thorn in the side of courts and law writers. Clarity of expression by its use, without more, often cannot be attained. That the term has a double meaning is well recognized. ". . . it will not be necessary to repeat the distinction . . . between the burden of proof and the necessity of producing evidence to meet that already produced. The distinction is now very generally accepted, although often blurred by careless speech." Mr. Justice Holmes in Hill v. Smith, 260 U. S. 592, 594 (1923). See 9 WIGMORE, EVIDENCE, §§ 2485, 2487; Ray, *supra* note 19; Abbott, *Two Burdens of Proof*, 6 HARV. L. REV. 125 (1892).

21. Since defendant in the instant case apparently did not pass his two preliminary hurdles, the court's holding was proper even though the prosecution did not adequately shoulder a "burden" in either sense of the term. "Defense counsel did no more than to assert that the evidence was unlawfully obtained." United States v. Krulewitch, 167 F.2d 943, 946 (C. C. A. 2d 1948).

22. Steel v. United States, 267 U. S. 505, 510 (1925); Ford v. United States, 273 U. S. 593, 605 (1927). See 9 WIGMORE, EVIDENCE § 2550: " . . . so far as the admissibility in law depends on some incidental question of fact . . . this also is for the judge to determine, before he admits the evidence to the jury." See also Maguire and Epstein, *Preliminary Questions of Fact in Determining Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927); Fraenkel, *supra* note 6, at 489.

23. One writer suggests it may be arguing in a vacuum to criticize the application of rules of evidence, developed for the guidance of a jury, to a preliminary question decided by the court. 34 MICH. L. REV. 440, 441 (1936).

bative evidence on both sides, a judge could allow his power of discretion full sway; on review the appellate court could not disturb his finding barring the familiar "clear abuse of discretion."[24]

Regardless of the precise character of the burden, there can be little doubt, in view of the foregoing, that in the federal courts the prosecution has at least a duty to proceed with the evidence after the accused has convinced the trial court of the timeliness and substantiality of his objection.[25]

A second aspect of the problem of derivatively tainted evidence requires some consideration. As stated in the second *Nardone* case, the causal connection between the illegal act and the derived evidence "may have become so attenuated as to dissipate the taint."[26] In other words, even though the lineage of a certain piece of evidence can be traced to an illegal "ancestor," the evidence may nevertheless in some instances be admitted as sufficiently legitimate. Of course when the illegality is the sole means by which evidence is obtained, that evidence will be excluded. But where it is apparently the product of more than one cause, its status becomes more difficult to determine.[27] The problem is not

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24. "It would be difficult to imagine a situation in which the trial court's attitude as to burden of proof on a preliminary question could become significant upon review." *Ibid.*

25. There is some similarity between the instant problem and that of the admissibility of confessions in those states which hold that a confession is prima facie inadmissible. The states following this rule of inadmissibility hold that if a confession is challenged, the burden is on the prosecution to prove it voluntary. People v. Boyce, 314 Mich. 608, 23 N. W.2d 99, 101 (1946); People v. Ickes, 370 Ill. 486, 19 N. E.2d 373, 375 (1939). The courts are split on this question, however, a majority apparently holding as stated. See 3 WIGMORE, EVIDENCE § 860. A number of states, including Indiana, follow the opposite rule, i.e., that a confession is prima facie admissible, the burden being on the defendant to prove it inadmissible. Hicks v. State, 213 Ind. 277, 11 N. E.2d 171 (1937); Milbourn v. State, 212 Ind. 161, 8 N. E.2d 985 (1937); Mack v. State, 203 Ind. 355, 180 N. E. 279 (1932).

26. Nardone v. United States, 308 U. S. 338, 341 (1939). Compare an earlier expression of the Court: "Of course this does not mean that the facts thus [illegally] obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others. . . ." Silverthorne Lumber Company v. United States, 251 U. S. 385, 392 (1920).

27. For example, suppose an accused's home is illegally searched by officers acting for the prosecution. They seize a letter containing John Doe's name and address. But in addition to the letter the prosecution has three other leads pointing to Doe as a possible witness. Should his testimony be excluded?

capable of a pat solution, but it is suggested that the trial judge may call to his aid certain rules which the courts have created to govern other situations where one result seemingly has several causes, e.g., the "substantial factor" test as it relates to the doctrine of proximate cause in the law of torts.[28] But again it must be observed that such considerations will not usually appear on the surface of a trial judge's decision and he should be held to account only for an abuse of his discretion.[29]

There is yet a third facet of the general problem of admissibility of derivatively tainted evidence worthy of mention. In the course of a criminal trial where once it has been shown that evidence has been illegally obtained, defense counsel might be greatly tempted to harass the prosecution and delay the trial with numerous plausible but unfounded objections to evidence on the ground of its being derivatively tainted. Should the trial court, at the risk of being held to have abused its discretion, be required in every such instance during the trial to conduct a separate inquiry? It is difficult to conceive of circumstances where, its timeliness and solidity having been shown, it would not be the trial judge's duty to hold such inquiry the first—and possibly the second—time that objection was made. But what if these allegations prove to be groundless and the accused continue to "cry wolf" and demand to be heard in further time-consuming collateral investigations?

As pointed out by Judge Chase in *United States v. Krulewitch*,[30] " . . . if the time and continuity factors were wholly disregarded, the disruptions . . . might well as a practical matter end only when the ingenuity and perseverance of

28. As generally stated, the test is that the defendant's tort must have been a substantial factor in causing the injury. Its origin is said to be found in Anderson v. Minneapolis, St. P. & S. S. M. R. Co., 146 Minn. 340, 179 N. W. 45 (1920), though it may date back to an article by Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 229, 230 (1911). See Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19 (1936).

29. The problem of "attenuation" treated in this paragraph should be clearly distinguished from the requirement previously discussed, that the accused must convince the trial judge of the "solidity" of his claim. The trial court may be convinced that defendant's objection is sufficiently "solid" (that is, plausible or probable) to warrant further inquiry. Yet the prosecution may prevail by proving either that there is no causal connection or that any such connection has become too attenuated to be legally significant.

30. 167 F.2d 943, 946 (C. C. A. 2d 1948).

counsel for the defendant had been exhausted." In view of this consideration and in view of the emphasis put upon the breadth of the trial court's discretion in the second *Nardone* case, it would not seem that an appellate court should hold that the trial judge abused his discretion in refusing additional interruptions which previous experience indicated would be unfounded. And this result would be defensible even though in a particular instance it could be shown that the defendant did have a valid objection. By making frivolous use of devices designed in part for his protection it may well be contended that he has waived their further protection.[31]

In evaluating the procedures and practices as developed herein, especially with reference to the problem of burden of proof, it is necessary to look briefly to the policy behind the rule excluding illegally obtained evidence. Such evidence is excluded in order to discourage the resort to illegal acts on the part of law enforcement officers and to free the courts from a stigma of duplicity in giving indirect sanction to such acts.[32] To the extent to which they exclude such evidence the courts which follow the rule have allowed these considerations to override the conflicting policy demand for detection and punishment of crime.[33] But there is no reason or desire to go further and prevent the punishment of

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31. This result does not seem overly harsh in view of the fact that the rule against illegally obtained evidence is not based upon a contention that it is unreliable. See Silverthorne Lumber Company v. United States, 251 U. S. 385, 392 (1920); Nardone v. United States, 308 U. S. 338, 341 (1939); 8 WIGMORE, EVIDENCE § 2183; Atkinson, *supra* note 1, at 12, 13.

32. Possibly the reason most frequently assigned for the rule is that it is thought to have a deterrent effect on law enforcement officers. Boyd v. United States, 116 U. S. 616 (1886); Bronaugh, *Tainted Evidence*, 31 LAW NOTES 188 (1928). In their zeal to convict criminals they also violate the law, it is said, thus bringing the Government into disrepute and causing it to set altogether the wrong type of example. Weeks v. United States, 232 U. S. 383 (1914); Arnold, *supra* note 6. ". . . for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part." Mr. Justice Holmes, dissenting in Olmstead v. United States, 277 U. S. 438, 470 (1928).

33. *See ibid;* Nueslein v. District of Columbia, 115 F.2d 690, 694, 695 (App. D. C. 1940); Nardone v. United States, 308 U. S. 338, 349 (1939); Atkinson, *supra* note 1, at 26. *But see* 8 WIGMORE, EVIDENCE § 2184. Professor Wigmore is violently opposed to the rule, characterizing the forces leading to it as "misplaced sentimentality."

a criminal if he can be convicted by legally obtained and competent evidence.[34]

In the light of these contesting public interests it is believed that the practices of the federal courts as here interpreted are essentially fair and workable and merit being followed by the various state courts which have adopted the rule excluding illegally obtained evidence. To hold that the employment of illegal means by the prosecution to secure evidence makes the balance of its case prima facie inadmissible upon objection by the accused, would certainly discourage the use of such means. But it would also place a well-nigh intolerable handicap upon the prosecution in presenting the legally obtained and competent portion of its case. To require (and allow) the defense to support its objection by showing its timeliness[35] and substantiality would mitigate the handicap and at the same time give ample regard to the policy behind the rule of exclusion. The accused having passed these initial hurdles it does not seem unreasonable to require the prosecution to proceed with the evidence or, at most, to produce a preponderance of the evidence.[36] Such procedure, administered within the bounds of the sound discretion of the trial judge, seems to strike a fair balance between the conflicting public interests involved.

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34. 8 *id.* § 2184*a*.

35. The burden of showing timeliness would range from light to nonexistent in those states tending to the view that a motion to suppress evidence directly obtained by illegal means is sufficiently timely though first made at trial. See note 6 *supra*.

36. " . . . this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so. . . . To impose the duty on the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared. . . ." United States v. Goldstein, 120 F.2d 485, 488 (C. C. A. 2d 1941). *See* Murphy, J., dissenting in Goldstein v. United States, 316 U. S. 114, 124, n. 1 (1942).