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Criminal Law-Search and Seizure-Implied Consent

CRIMINAL LAW—SEARCH AND SEIZURE—IMPLIED CONSENT—Defendants were convicted of fornication on the testimony of police officers, as to what they saw and heard after their entrance into the hotel room occupied by defendants. The officers had knocked on the door, and after a delay of four or five minutes, defendant Warner opened the door, and stepped back,

and the officers then entered. There was no command on the part of the officers, nor any protest to their entrance by the defendants. The error relied on by the defendant was the admission of the testimony of the officers, on the ground that the search and seizure was illegal. *Held*, affirmed. The court stated that defendants waived their right to invoke immunity when defendant opened the door and stepped back, making no protest, since the officers had a right to assume that they were invited to enter. *Warner v. State*. Appellate Court of Indiana. December 9, 1930, 173 N. E. 599.

The practical result of this case is that a duty is placed on a private person to make a protest if he wishes to invoke the immunity from unlawful search and seizure guaranteed him by the constitution. If silence is to be construed as an invitation to enter and search, then to be strictly logical, an express assent or consent to search under a void search warrant should be given the same construction. Such construction, however, is contrary to the rule announced in the other Indiana cases. See *Meno v. State*, 148 N. E. 420, 197 Ind. 16. In that line of cases express consent gained under pretense of a warrant or under a void warrant, is not an invitation to search that will constitute a waiver of the constitutional immunity.

This case does not construe the constitutional guaranty liberally in favor of a private person, and in this particular does not follow the principle announced in *Flum v. State*, 141 N. E. 353 (Ind.). It is well settled that this constitutional immunity may be waived. *Hurst v. State*, 219 Pac. 151; *State v. Motilla*, 71 Mont. 351, 229 Pac. 724. But the submission to search must be voluntary, and if there is any coercion or duress, the search is illegal, and there is strong authority that lack of protest or acquiescence does not render it legal. *Smith v. State*, 133 Miss. 730, 98 So. 344. In that case the court said that the officer is supposed to know that the private citizen is silently objecting to an unauthorized search, and that unless his permission is obtained the search is illegal. *People v. Sakira*, 193 N. Y. S. 306, acknowledges this principle and holds that mere non-resistance does not waive the right as it is merely a submission to a show of lawful authority. *State v. Wakefield*, 184 Wis. 56, 198 N. W. 854, points out that not only would resistance be impotent, but that it would also be a breach of the peace. *State v. Owens*, 302 Mo. 308, 259 S. W. 100, holds that yielding to the demand of an officer for search is not a waiver since it is done under constraint of his legal capacity. It must be clearly established that the submission was voluntary. *United States v. Lydecker*, 275 Fed. 976; *United States v. Rembert*, 284 Fed. 996; *United States v. Durser*, 270 Fed. 818.

In the principal case it did not appear that the officers disclosed their identity or their purpose, or that they were in uniform so that defendant might have ascertained the same. The mere answering of the door would not constitute a waiver of the immunity, nor on the authorities cited, would mere silence do so. The basis, therefore for the waiver, and implied invitation to enter, must have been the act of stepping back from the door after opening it, either solely or in conjunction with the silence of the defendant. To have averted the subsequent search, defendant would have been forced to protest or forcibly resist any further attempt to enter after his protest. It does not seem good policy to place such a duty on a person in order to

preserve his constitutional rights. This case, however, goes farther than to merely advance the doctrine of implied invitation, since the case was based on the right of the officers to assume that they were invited to enter, which is, to say the least, not construing the constitutional guaranty liberally in favor of private persons. *Flum v. State, supra.*

As a question of justice in the particular case, there could be no doubt of the guilt of the defendants, but as a matter of law it seems that the court has made new law in regard to searches and seizures that has not yet received the sanction of the courts of other jurisdictions. For other case notes on the same general subject, see 5 Ind. L. J. 457, 642.

H. N. F.