Notre Dame Law Review

Volume 8 | Issue 3 Article 2

3-1-1933

Motions to Suppress Evidence in Criminal Prosecutions in Federal Courts

John Jones

MOTIONS TO SUPPRESS EVIDENCE IN CRIMINAL PROSECUTIONS IN FEDERAL COURTS

In a motion or petition to suppress evidence a respondent accused of crime invokes the aid of the court against a claimed violation of his constitutional rights, and to prevent the use against him of evidence which he claims was unlawfully obtained. While not the only manner of presenting the matter to the court, such motions or petitions provide a simple method of procedure, which in the great majority of cases is fully adequate.

Reference to a few historical facts may not be out of place. Among the grievances which ultimately led to American independence was the exaction of duties upon imports. From this distance we may safely admit that some patriots evaded them. Such evasion was more or less a matter of principle, and was a fairly effective protest against taxation without representation. One of the outrages which became unbearable was the flagrant disregard of the rights of citizens in the searching for smuggled goods, by virtue of so-called Writs of Assistance.

These writs had their origin in the Statute, 13 and 14 Car. 2, Chapter 11, Section 5, which, among other things, purported to authorize the issuance of Writs of Assistance, to command the examination of ships and vessels and persons found therein, for the purpose of finding goods, the importation or exportation of which was prohibited, and to authorize the officers charged with their enforcement to enter into and search any suspected vaults, cellars or warehouses for such goods.

The practice had obtained in the Colonies of issuing Writs of Assistance to the revenue officers empowering them, in their discretion, to search suspected places for smuggled goods, thus leaving the matter of the search of a particular place to the discretion of the officer. It was this practice

which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law book," since they placed "the liberty of every man in the hands of every petty officer." At about the same time the controversy between John Wilkes and the British government was raging. Among the abuses which had crept into the administration of public affairs in Great Britain was the practice of issuing general warrants by the Secretary of State, for searching private houses, and the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. The decision in the case of *Entick v. Carrington,*[1] which decision was handed down in 1765, was naturally well known to American statesmen as was indeed the history of the entire controversy.

With these facts and the causes of the War of the Revolution in mind, it becomes apparent that the Bill of Rights was added to the Constitution for the express purpose of preventing such abuses.

The Fourth Amendment provides:

"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."

The Fifth Amendment provides in part:

"No person shall . . . . be compelled in any criminal case to be a witness against himself."

In the application of these provisions of the Bill of Rights and particularly in their application to the National Prohibition Act, we have had the extremists on the one hand who could vision neither inconsistency nor danger in scrapping the Constitution in order to more strictly enforce a particular

[1] 19 How. St. Tr. 1029 (1765).

law; and we have had those other extremists who seem to look upon the Constitution as a screen or barrier behind which commercialized law-breaking might function with impunity. Those in the one group have not realized that the Natural Rights of Man, which the Bill of Rights was designed to safeguard, are more vitally important than the enforcement of a particular statute could possibly become. The members of the other group have not realized that one of the objects of the Constitution is to establish justice.

To the credit of our institutions it may properly be recorded that the courts of the United States seem to have found no great difficulty in maintaining the safeguards of the Bill of Rights in all their vigor and at the same time preventing their becoming a tacit permission to commit crime.

Searches and seizures without search warrants are not necessarily unreasonable. (a) An officer lawfully upon premises may lawfully seize property of the government or smuggled property or counterfeit money or intoxicating liquor unlawfully possessed, which comes to his attention. (b) He may lawfully search an automobile or other vehicle or conveyance upon probable cause to believe that it contains smuggled property or intoxicating liquor, and he may seize the contraband goods. (c) He may lawfully, as incident to a lawful arrest, search the person of his prisoner and the premises where the arrest is made, and seize all goods and articles used or kept for use in the commission of the crime.

These powers are essential to the right of the Government to defend itself against crime. They are proper and reasonable. They are not within the prohibition of the Fourth Amendment, that being against only such searches and seizures as are unreasonable. This enumeration is merely illustrative. An exhaustive discussion of that phase of the subject is impossible here. One standard textbook on searches and seizures contains 1,100 pages without covering every possible question.

Strictly speaking, perhaps, this discussion should be confined to motions in the district courts. There is, however, a matter within the jurisdiction of United States commissioners which should be noticed. This jurisdiction is purely statutory and is confined within narrow limits. It has its origin in the statute under which the United States commissioner commonly issues search warrants, and applies only to searches and seizures under search warrants issued by him. It cannot with entire accuracy be said to have for its object the protection of rights guaranteed by the Fourth Amendment, but is rather intended to prevent abuses of the statute permitting the issuance of search warrants. The ultimate effect, however, of such procedure before the commissioner is to protect against violations of the Fourth and Fifth Amendments.

The statute under which search warrants are usually (but not always) issued is the Act of June 15, 1917, commonly called the Espionage Act. The Fourth and Fifth Amendments naturally govern all searches and seizures, with a warrant or without a warrant. In the issuance of a search warrant the same rules apply as in the issuance of any other warrant. The person who makes the complaint, or affidavit, must state facts showing probable cause for the issuance of the warrant. All mere conclusions must be disregarded. The commissioner or court issuing the warrant and not the one applying for it must determine whether the requisite probable cause exists to believe that the property to be searched for is being possessed contrary to law.

Ordinarily the question of whether a search or seizure is in violation of the Fourth Amendment must be determined by the district court. The commissioner who issued the warrant has no jurisdiction or authority, except as given by statute, to pass upon any motion, the object of which is to suppress evidence. The commissioner in fact is not ordinarily deemed a judicial officer.

He is, however, by sections 15 and 16 of the Espionage Act, given a limited jurisdiction with regard to search warrants already issued by him. The issuance of a search warrant is a purely *ex parte* proceeding. The person who claims that his rights have been violated by a search or seizure has no opportunity to raise any question in that regard until after the search and seizure are made. It is provided in section 15 of the Espionage Act that if the grounds upon which the warrant was issued be controverted, the judge or commissioner who issued the search warrant must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by such witness. Section 16 provides that if it appears that the property or paper taken was not the same as that described in the warrant, or where there is no probable cause for believing the existence of the grounds upon which the warrant is issued, the judge or commissioner who issues the warrant shall cause such property or paper to be restored to the person from whom it was taken. It should be noted in this connection that where the facts upon which probable cause was founded are controverted, the burden of proving their falsity is upon the person controverting them. It should also be noted that the provision in section 16 for the return of the property taken does not apply in all cases. Where the property taken was unlawfully possessed, the courts have held that the commissioner has no authority to order it returned.

The foregoing are the only matters upon which a search warrant can be attacked before a commissioner. All other attacks upon search warrants and all attacks upon searches or seizures made without a warrant must be made before the district court. The commissioner has no inherent or common-law power to suppress evidence gained through search warrant, and has no power or jurisdiction whatever to suppress evidence obtained without a search warrant.

Judge Cooper, of the District Court for the Northern District of New York, expressed these rules as to the discretion and jurisdiction of the commissioner as follows:[2]

"In determining the existence of probable cause, he exercises a discretion judicial in its nature. Veeder v. U. S. (C. C. A.) 252 F. 414; U. S. v. Elliot (C. C. A.) 5 F. (2d) 292. He undoubtedly exercises like discretion, judicial in its nature, when he entertains a proceeding to controvert the ground on which the search warrant was granted, and decides whether or not there is probable cause for believing the existence of the ground on which the search warrant was issued. But at both times, and at all times, his power is granted by sections 625 and 626 of title 18, and limited by title 2, § 25, of the Prohibition Law. He has no inherent or common-law power with reference to issuing or quashing search warrants. U. S. v. Jones (D. C.) 230 F. 262, 265, *supra.*"

* * * *

"The statutory rights granted by sections 625 and 626 must not be confused with the constitutional guaranties of the Fourth and Fifth Amendments to the Federal Constitution. Sections 625 and 626 were not enacted until 1917, but the rights granted by the Fourth and Fifth Amendments have existed since the adoption of these amendments. It is the duty of the courts to enforce these constitutional rights, but the commissioner has no power in respect thereto.

"The defendant's right to inquire into the legality of the seizure, and the competence of evidence against him of the things seized, is not confined to the rights given by section 626, nor limited to application to the commissioner, even while the commissioner has jurisdiction or authority. Independent of statute, the defendant may apply to the court, but not to a commissioner, for inquiry into probable cause for the issuance of the search warrant, the legality of the seizure, whether with or without search warrant, the competence of the seized articles as evidence, and for an order directing the return of the seized articles. All of this is in the enforcement of the constitutional rights of the defendant. This, unlike the power granted to the commissioner under sections 625 and 626, is a continuing one."

A motion or petition to suppress evidence must be made and filed in the district court. It is not essential that a prosecution in that court be then pending. Although apparently seldom done, it is nevertheless possible to make a motion or a petition in district court to suppress evidence which

2 United States v. Napela, 28 Fed. (2d) 898, 900, 903 (1928).

is about to be used against the petitioner in proceedings pending before a commissioner. This is because the commissioner is an officer of the court and the court has supervisory power over him. In such case the district court may upon proper proceedings suppress the evidence and it cannot thereafter be used before the commissioner. This, however, seems to be a rather exceptional use of motion or petition to suppress. The proceeding ordinarily takes place after the actual commencement of the prosecution in district court.

Certain things are necessary to a proper motion or petition: (a) It must allege facts which show that the rights of the petitioner, under the Fourth Amendment, have been violated by an unlawful search of his person or property or an unlawful seizure of his property, papers or effects. It has been held that the petition must also show that the premises searched were in the possession of the petitioner or that the property, papers or effects were taken from his possession. (b) It must also allege that it is intended to use the property, papers or effects seized or the information obtained in and about such unlawful search or seizure or both as evidence against the petitioner. (c) The showing as to these matters must be by allegations of fact and not of mere conclusions. (d) The petition or motion for the suppression of evidence must be a timely one.

This last requisite has received so much attention in the decided cases and has been the subject of so much confusion and misunderstanding that a more extended discussion will not be out of place.

It has been given particular consideration in the following decisions of the Supreme Court: *Adams v. New York;*[3] *Weeks v. United States;*[4] *Gouled v. United States;*[5] *Amos*

---

[3] 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1903).

[4] 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B 834, Ann. Cas. 1915C 1177 (1913).

[5] 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1920).

v. United States;[6] *Agnello v. United States*;[7] and *Segurola v. United States*.[8]

All these decisions go to the question of what is necessary in order that a motion or petition to suppress (or an objection to evidence) in a particular case may be considered timely.

In the *Adams* case the court said:

"No objection was taken at the trial to the introduction of the testimony of the officers holding the search warrant as to the seizure of the policy slips; the objection raised was to receiving in evidence certain private papers. These papers became important as tending to show the custody by the plaintiff in error, with knowledge, of the policy slips. The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained. The rule is thus laid down in Greenleaf (vol. 1, § 254*a*):

" 'It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.'

"The author is supported by numerous cases."

It should be noted, however, that this decision also goes further by way of discussion and uses language which might be considered as holding that in no case could the defendant protect himself upon his trial against evidence obtained through an unconstitutional search or seizure. This language appears to have been so understood by lawyers generally, and was evidently so understood by the Department of Justice. In the *Weeks* case it was contended by the Govern-

6 255 U. S. 313, 65 L. Ed. 654, 41 S. Ct. 266 (1920).
7 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925).
8 275 U. S. 106, 48 S. Ct. 77, 72 L. Ed. 186 (1927).

ment that, the letters in question having come into the control of the court, the court would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use as evidence.

In the *Weeks* case, after the defendant had been arrested by police officers and after they had taken possession of certain papers and articles, the United States marshal searched the defendant's room for additional evidence and carried away certain letters and envelopes which he found in the drawer of a chiffonier. He had no search warrant. A petition was made that the trial court order the return of these papers so seized by the marshal (which petition also asked the return of the property seized by the police officers). Upon consideration of the petition the court directed the return of such property as was not pertinent to the charge against the defendant, but denied the petition as to pertinent matter, reserving the right to pass upon the pertinency at a later time. In disposing of the matter, the court said:

"We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial we think prejudicial error was committed."

In the *Gouled* case two matters were involved:

(a) Papers were taken without defendant's knowledge and he did not learn that they had been taken and were in the possession of the Government until a Government witness, one Cohen, took the stand and testified to the taking of the papers. Objection was then made to the admission of the papers in evidence. It was held: (1) that the taking was in violation of the Fourth Amendment; and (2) that the objection under those circumstances was not too late though made during the course of the trial, because made

upon the first knowledge the defendant had that the Government was in possession of the papers. In disposing of that question, the court said:

"The facts derived from the certificate, essential to be considered in answering the first two questions, are: that in January, 1918, it was suspected that the defendant Gouled, and Vaughan were conspiring to defraud the government through contracts with it for clothing and equipment; that one Cohen, a private in the Army, attached to the Intelligence Department, and a business acquaintance of defendant, Gouled, under directions of his superior officers, pretending to make a friendly call upon the defendant, gained admission to his office and in his absence, without warrant of any character, seized and carried away several documents; that one of these papers, described as 'of evidential value only,' and belonging to Gouled, was subsequently delivered to the United States district attorney, and was by him introduced in evidence over the objection of the defendant that possession of it was obtained by a violation of the 4th or 5th Amendment to the Constitution; and that the defendant did not know that Cohen had carried away any of his papers until he appeared on the witness stand and detailed the facts with respect thereto as we have stated them, when, necessarily, objection was first made to the admission of the paper in evidence.

"Out of these facts arise the first two questions, both relating to the paper thus seized. The first of these is:

" 'Is the secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only, by a representative of any branch or subdivision of the government of the United States, a violation of the 4th Amendment?'

"The ground on which the trial court overruled the objection to this paper is not stated, but from the certificate and the argument we must infer that it was admitted, either because it appeared that the possession of it was obtained without the use of force or illegal coercion, or because the objection to it came too late.

"The objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the government was in possession of the paper, the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable."

* * * *

"The second question reads:

" 'Is the admission of such paper in evidence against the same person when indicted for crime a violation of the 5th Amendment?'

"Upon authority of the Boyd Case, *supra*, this second question must also be answered in the affirmative. In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the 5th Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

(b) In that case papers having evidential value only and in which the Government had no other interest were taken under a search warrant issued under the Espionage Act. A motion was made before trial for the return of these papers, the granting of which would necessarily have suppressed them as evidence. The motion was denied and the case came on for trial before another judge. Objection was made to the introduction of the papers in evidence and the trial judge held that he was bound by the decision of the motion. Here, as said by the court, it must have become apparent during the trial that the papers had been unconstitutionally seized and it was held that when this appeared and objection was made the court should have considered the objection upon its merits and not have depended upon any ruling as to timeliness of motion. In that regard the court said:

"It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance. yet, after all, it is only a rule of procedure and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

"In the case we are considering, the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant."

In the *Amos* case, decided the same day as the *Gouled* case, it was held: (a) that the petition for return of property (which would result in suppression of evidence) was timely though not made until after the jury was sworn; and (b) that the Government's own evidence showed the search to have been made in violation of the constitutional safeguards; that the petition for return of property should therefore have been granted and the motion to exclude the property and testimony should have been sustained. The *Gouled* case is cited as authority. The *Agnello* case is in line with the *Gouled* and *Amos* cases.

These decisions seem to have caused a considerable amount of confusion in that they were taken to mean that the Supreme Court had rejected entirely the rule of the *Adams* case, recognized in the *Weeks* case, that a motion to suppress must be timely. This confusion is reflected in the case of *Ganci v. United States*,[9] decided by the Court of Appeals of the Second Circuit in 1923. It was there held that a motion to exclude evidence may be made and must be entertained at any time prior to verdict, and the *Gouled* and *Amos* cases are cited as authority. The *Ganci* case was without question correctly decided, but it is suggested that the decision might more properly have been placed upon the ground that the uncontroverted evidence of the Government showed the search and seizure to be in violation of the Constitution, and that, therefore, upon the offering

[9] 287 Fed. 60 (1923).

of the evidence obtained thereby, an objection to the evidence should have been sustained and a motion to strike out the oral testimony should have been granted.

The matter is clarified by the opinion rendered by the Circuit Court of Appeals of the 6th Circuit, in *Salata v. United States,*[10] in which the court, in deciding the matter, says:

"It is clear from the uncontradicted testimony of the federal prohibition agent, Beilstein, that this search warrant was not issued by any one having authority to issue the same, nor, as required by statute, upon probable cause, supported by affidavit.

"The objection to the introduction of this liquor in evidence was overruled by the trial court, for the reason that the objection to the validity of the search warrant and the application for re-delivery of the liquor to Salata were not made within a reasonable time after the alleged illegal seizure, and that, therefore, the court was not required to halt the trial to determine the collateral issue of whether evidence, otherwise competent, had been unlawfully acquired. Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; U. S. v. O'Dowd (D. C.) 273 Fed. 600.

"While there does not appear to be any conflict in the authorities in reference to this general rule, yet in this particular case the defendant's objection to the admission in evidence of the property taken and testimony concerning the same, tendered no collateral issue of fact because the facts were not in dispute. These facts were disclosed to the court by the uncontradicted testimony of the government's witness, the federal prohibition agent, who had procured the warrant and made the search and seizure.

"The question here presented is substantially the same question, arising upon practically the same state of facts as the question decided by the Supreme Court of the United States in Amos v. U. S. . . ."

It therefore appears that the rule requiring motion before trial ordinarily applies only to cases where the question of the validity of search or seizure involves a question of fact; that where the invalidity appears affirmatively from the evidence introduced by the Government, the court upon proper objection will rule out the evidence. The decision of the *Ganci* case that a motion to suppress may be made at any time before verdict is against the great weight of authority. The following later decisions, among others, are

10 286 Fed. 125 (1923).

to the contrary: *MacDaniel v. United States;*[11] *Winkle v. United States;*[12] *Tucker v. United States;*[13] *Landwirth v. United States;*[14] and *Harkline v. United States.*[15] These cases were decided after the *Gouled* and *Amos* cases. All of them disagree with the *Ganci* case. Substantially all of them contain language which would indicate that the right to suppress evidence may be waived by undue delay in the making of a motion to suppress, even though the facts which show the search or seizure unconstitutional are not denied and are a part of the Government's case.

It is, however, to be regarded as extremely doubtful whether, in view of the decisions in the *Amos, Gouled,* and *Agnello* cases, the court could properly refuse to exclude evidence obtained on a search or seizure which the Government's own evidence shows to have been in violation of the Fourth Amendment, even though there had been ample opportunity to make a motion to suppress and such motion was not made. The refusal to entertain a motion to suppress evidence *during the trial is because the court will not* stop the trial to inquire into a collateral issue. Where the Government's own evidence shows the search or seizure invalid no inquiry is necessary. An objection to evidence or a motion to strike may be ruled upon without halting the trial. To refuse to reject the evidence upon proper objection under those circumstances would be to place a mere rule of procedure above the constitutional rights of the accused, which is precisely what is condemned in the *Amos, Gouled,* and *Agnello* cases.

On the other hand, it may fairly be said that one acting as counsel for an accused, who fails to promptly make a motion or petition to suppress evidence obtained in violation of the constitutional rights of the accused is risking both his client's liberty and his own standing at the bar.

11 294 Fed. 769 (1924).
12 291 Fed. 493 (1923).
13 299 Fed. 235 (1924).
14 299 Fed. 281 (1924).
15 4 Fed. (2d) 527 (1925).

The *Segurola* case was decided in 1927. The opinion of Chief Justice Taft, in that case, might be said to indicate that in his opinion the right after trial commenced to raise the question of illegal search or seizure is limited to cases where there was no opportunity to present the matter at an earlier period of the proceedings. However, he was stating the general rule only and can scarcely be deemed to have overruled the *Amos, Gouled,* and *Agnello* cases, or to hold that the court will ignore violations of constitutional rights where such violations are shown by the Government's own evidence.

The matter may be summarized thus:

(a) The general rule is that in order to be timely a motion to suppress must be made before the commencement of trial.

(b) If the Government's own evidence shows that the search or seizure was in violation of the constitutional rights of the accused, the question may be raised when that fact appears.

(c) If the accused does not learn until during the trial that the Government possesses evidence obtained in violation of his constitutional rights, his action to suppress is timely if made as soon as he learns of that fact, which is usually at the time the evidence is offered against him.

It will be seen that the courts of the United States have been vigilant and their action has been effective in the protection of rights guaranteed by the Fourth and Fifth Amendments. The procedure is fairly simple and is always available. Its purpose and object, however, is to extend the protection of the Fifth Amendment to those whose rights under the Fourth have been violated. The most prolific source of confusion (and of argument) has been the failure of advocates to distinguish between such searches and seizures as are reasonable, and such as are unreasonable.

John Jones.

Ironwood, Michigan.