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Administrative Law -- Private Search and Seizure

W. Lunsford Long

NOTES

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In *Knoll Associates, Inc. v. FTC*,[1] the Seventh Circuit Court of Appeals held that the fourth amendment precludes admission, in a Federal Trade Commission proceeding, of records stolen by a private individual.

In 1962 the Commission filed a complaint charging Knoll, a furniture manufacturer, with price discrimination in violation of section 2(a) of the Clayton Act.[2] At the hearing, Knoll objected to the introduction of certain company records stolen by a former employee, Herbert Prosser. The objection was overruled[3] and a cease and desist order subsequently issued. The court of appeals reversed and remanded to the Commission with instructions to disregard the evidence in question.[4]

The court of appeals decided that the undisputed evidence showed Prosser had stolen the records to aid the FTC and that therefore the records were inadmissible under *Gambino v. United States*.[5] In that case, evidence unconstitutionally seized by state police and given to federal officials was held inadmissible in the ensuing federal trial on the ground that the state police had procured the evidence for the purpose of aiding the United States.

There is some question whether *Gambino* is proper authority for the exclusion of records stolen by a private individual. *Gambino* was decided after *Weeks v. United States*,[6] but before *Elkins v. United States*.[7] *Weeks* made the exclusionary rule applicable in federal trials to evidence seized in violation of the fourth amendment by *federal* offi-

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[1] 397 F.2d 350 (7th Cir. 1968).

[2] 15 U.S.C. § 13(a) (1964), *formerly* ch. 323, § 2, 38 Stat. 730 (1914).

[3] Knoll Assoc., Inc., [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,881, at 21,911 (FTC 1964).

[4] 397 F.2d at 537. The court thus applied the fourth amendment exclusionary rule to an administrative proceeding. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), held that the exclusionary rule was applicable to a forfeiture proceeding because the proceeding's punitive characteristics made it quasi-criminal, thus justifying the use of constitutional safeguards. Arguably, FTC proceedings are sufficiently criminal to warrant application of the exclusionary rule. Jones v. Securities and Exch. Comm'n, 298 U.S. 1, 24-25 (1936), notes that the ever expanding administrative agencies cannot be permitted to encroach on the fundamental rights of individuals. These two cases would seem to support, if not require, administrative application of the exclusionary rule.

[5] 275 U.S. 310 (1927).

[6] 232 U.S. 383 (1914).

[7] 364 U.S. 206 (1960).

cials. It did not apply to the fruits of state officials' unconstitutional activity. As a result, state officers often violated the fourth amendment, giving the resultant evidence to their federal counterparts for use in a federal prosecution.[8] To counter this practice,[9] the Supreme Court, in *Gambino*, extended the exclusionary rule in federal trials to encompass evidence unconstitutionally obtained through *state* illegality whenever that illegality had been perpetrated for the purpose of aiding the United States. *Elkins* ended the need for the *Gambino* rule, for the Court held that all evidence obtained in violation of the fourth amendment by state or federal officials was inadmissible in a federal trial.[10]

Thus, the *Gambino* exclusionary rule was merely an interim device designed to curb the "silver platter" practice. Formulated to control state officials, its application was limited to their activity and it has now been superseded. It would seem that *Gambino's* test of whether an illegal act was committed for the purpose of aiding the United States is irrelevant when private conduct is in issue.

The law of search and seizure as related to the acts of private individuals appears more properly controlled by *Burdeau v. McDowell*.[11] In that case, private detectives stole records later turned over to the United States for use in a criminal prosecution. The Court flatly stated that the fourth amendment did not apply to individual conduct and held that since no connection was shown between the Government and the perpetrators of the illegality, the records were admissible. Thus, the decision seems to be that private illegality will be excluded only when the Government is somehow involved in the wrongdoing.

In *Knoll*, the court of appeals treated *Burdeau* in a summary fashion. The court felt that Prosser's calls to the FTC and his subsequent testimony at the hearing clearly showed governmental involvement in the illegality. This is an arguable finding. In every case in which the Government uses evidence obtained by private individuals there will be involvement of the type noted by the *Knoll* Court, if only to enable the evidence to change hands. *Burdeau* would logically seem to require gov-

[8] This practice later became known as the "silver platter" doctrine. Lustig v. United States, 338 U.S. 74, 79 (1949).

[9] An earlier case, Byars v. United States, 273 U.S. 28 (1927), attempted to curtail this same practice by excluding the evidence when state and federal officials had acted jointly.

[10] Mapp v. Ohio, 367 U.S. 643 (1961), superseded *Elkins* in holding that the exclusionary rule prohibited the use in state *or* federal court of evidence seized in violation of the fourth amendment by state or federal officials.

[11] 256 U.S. 465 (1921).

ernmental involvement in the planning or execution of the illegality, rather than mere contact with the donor of the evidence, in order to justify exclusion. Under this interpretation of *Burdeau's* requirement of governmental action, and on the facts of *Knoll*, the stolen records would be admissible as being the fruits of private illegality. When Prosser first contacted the FTC lawyers, he told them he had been getting a "raw deal [from Knoll]" and that he had "enough papers to hang Knoll."[12] This seems to indicate that Prosser had decided to steal, and possibly had already stolen, the papers before he contacted the Commission and leads to the conclusion that the Government was not "involved" in any meaningful sense of the word.

Why should the Seventh Circuit use such an indiscriminate test for Governmental involvement? This mistreatment of *Burdeau* may have been caused by a feeling on the part of the court that the case is no longer good law. Whether this is so is debatable. It has been urged that *Elkins v. United States* has overruled *Burdeau* in enunciating a general rule that federal courts may not admit evidence obtained by state police during a search, which if conducted by federal officers, would have been illegal.[13] This view assumes that "private individuals" may be substituted for "state police" in the above formula. However, it may be erroneous to assume that state action and individual action are constitutionally equivalent, especially since *Wolf v. Colorado*[14] made it clear that at least the core of the fourth amendment controls state police activity.[15] This assumption would erase all distinction between governmental and non-governmental action, the distinction upon which *Burdeau* is based.

This same distinction has become blurred in other areas,[16] and it has been said that this blurring process will lead to the demise of

[12] 397 F.2d at 532.

[13] See Williams v. United States, 282 F.2d 940, 941 (6th Cir. 1960) (assumes this in dictum); Sackler v. Sackler, 15 N.Y.2d 40, 45, 203 N.E.2d 481, 484, 255 N.Y.S.2d 83, 87 (1964) (dissenting opinion); *contra*, People v. Horman, 22 N.Y.2d 378, 239 N.E.2d 625, 292 N.Y.S.2d 874 (1968).

[14] 338 U.S. 25 (1949).

[15] Note, *Mapp v. Ohio and Exclusion of Evidence Illegally Obtained by Private Parties*, 72 YALE L.J. 1062, 1064 n.18 (1963). Although Mapp v. Ohio, 367 U.S. 643 (1961), overruled *Wolf*, this aspect of the case should still be valid. *See* Elkins v. United States, 364 U.S. 206, 213 (1960); Irvine v. California, 347 U.S. 128, 132 (1954); Stefanelli v. Minard, 342 U.S. 117, 119 (1951).

[16] Notably in the civil rights area. United States v. Guest, 383 U.S. 745, 755-56 (1966); Griffin v. Maryland, 378 U.S. 130 (1964); Peterson v. City of Greenville, 373 U.S. 244 (1963); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

Burdeau.[17] However, the breakdown of the distinction is not a *reason* to overrule *Burdeau*, but merely a means to that end. By using this breakdown in other areas as authority, the Court could remove its self-imposed governmental action barrier and exclude the fruits of private illegality. It should not do so unless there is a valid reason.

A valid reason for overruling *Burdeau* may lie in the emergent "right of privacy" recently articulated by the Supreme Court.[18] This right of privacy, embodied in the fourth and fifth amendments, among others, may be so strong as to compel the exclusion of the fruits of its invasion even when the invader is a private citizen. Under this theory it would not matter *who* committed the violation—whenever the government sought to utilize its fruits the exclusionary rule would apply. This reasoning does not deny continued validity to the governmental action requirement, but instead finds such action in the government's attempted use of the evidence. This redefining of "governmental action" hinges on a private individual's illegal searches and seizures being held violative of the emergent right of privacy. The Court may be more willing to find such private illegality a violation of this right of privacy than it has been to find it an unadorned fourth amendment violation. As the right of privacy expands, the chances for *Burdeau's* demise become more real.

However, *Linkletter v. Walker*[19] may indicate that the right of privacy is not as vigorous as might have been assumed. There the Court refused to give retroactive effect to *Mapp v. Ohio*[20] because, it reiterated, the policy of the exclusionary rule is to deter police illegality and no deterrence would be brought about by release of those already imprisoned. Thus, the espousal of a pure deterrence rational seems to imply that the right of privacy is a concept of limited usefulness, for an ever expanding constitutional right of privacy would seemingly have demanded retroactivity for *Mapp* in order that the transgressed privacy of those imprisoned be vindicated.

Thus, it would appear that *Burdeau* has continued validity, at least until the extent of the right of privacy is more fully articulated.[21] In

[17] Comment, *The Exclusion of Evidence Wrongfully Obtained by Private Individuals*, 1966 UTAH L. REV. 271, 274.

[18] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Mapp v. Ohio, 367 U.S. 643 (1961).

[19] 381 U.S. 618, 636 (1965).

[20] 367 U.S. 643 (1961).

[21] *See* United States v. American Rad. & Stand. Sanit. Corp., 278 F. Supp. 241 (W.D. Pa. 1967).

the final analysis, the *Knoll* court seemed to sense this, as shown by its attempt to distinguish *Burdeau*; in reality it based its decision not on *Gambino* but on the idea that judicial integrity and the concept of an ordered society would be jeopardized were the courts to sanction governmental illegality by permitting the use of unconstitutionally obtained evidence.[22] Though disfavoring *Burdeau*, the court of appeals seemed to realize that there is no present ground for overruling that case. By distinguishing rather than disturbing, the court has avoided direct confrontation with a Supreme Court precedent and, at the same time, has undermined that precedent, for to distinguish a case which seems clearly controlling does little to strengthen it as precedent.

W. LUNSFORD LONG

Civil Procedure—Federal Rule of Civil Procedure 50(d)—Disposition of Cases by the Court of Appeals after Granting Judgment Notwithstanding the Verdict

In the recent case of *Neely v. Martin K. Eby Construction Co.*,[1] the Supreme Court attempted to clarify the procedure involved in using the judgment notwithstanding the verdict[2] at the appellate level in the federal system[3] under Federal Rule of Civil Procedure 50(d).[4] *Neely* was a diversity action in which the jury awarded plaintiff damages in her wrongful death action against defendant. After the verdict was returned, defendant moved under Rule 50(b) for judgment n.o.v., or in the alternative, for a new trial. The trial judge denied both motions and ordered judgment entered for plaintiff on the verdict. On appeal, the court of appeals ruled that the evidence was legally insufficient to go to the jury on the issue of negligence and ordered judgment n.o.v. for defendant. Then, instead of remanding the case to the trial court for new trial

[22] Elkins v. United States, 364 U.S. 206, 223 (1960), notes that the courts ought not to be a party to illegality by permitting the Government to use evidence in violation of the Constitution.

[1] 386 U.S. 317 (1967). This case has also been noted in *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 218 (1967).

[2] Hereinafter referred to as judgment n.o.v.

[3] For a general treatment of the practice and procedure in the federal system under Federal Rule 50, see F. JAMES, CIVIL PROCEDURE § 7.22 (1965); 5 J. MOORE, FEDERAL PRACTICE ¶¶ 50.01-.17 (2d ed. P. Kurland recomp. 1966) [hereinafter cited as MOORE]; Annot., 69 A.L.R.2d 449 (1960).

[4] FED. R. CIV. P. 50(d). See note 22 *infra*.