HOUSING INSPECTIONS WITHOUT WARRANTS

State ex rel. Eaton v. Price,[1]
168 Ohio St. 123, 151 N.E.2d 523 (1958)

Petitioner sought a writ of habeas corpus following his arrest for refusing to permit a housing inspector to enter his home pursuant to a city ordinance[2] which authorized inspections to determine compliance with minimum housing standards. He contended that the ordinance was unconstitutional because no warrant was required for entry against his will. In reversing the lower court, the Supreme Court of Ohio held that a housing ordinance authorizing inspections at reasonable hours and upon showing of appropriate identification meets federal and state constitutional safeguards against unreasonable searches and seizures.

Housing codes have been utilized by many cities in recent years to help prevent urban blight.[3] A typical housing code prescribes minimum standards respecting the condition, the maintenance and the occupancy of existing dwellings and has the ultimate purpose of protecting the health and safety of the entire community.[4] The effectiveness of a housing code depends upon the adequacy of its system of enforcement; but no matter what method of enforcement is employed an efficient inspection system is necessary to insure its success.[5] In a recent study of fifty-seven housing codes it was found that nearly two thirds of the cities considered a right of entry on the part of the inspectors necessary.[6]

The general area of search and seizure has been extensively litigated, but only a few recent cases have considered the question of housing inspections made without a warrant and against the will of the occupant. Prior to 1949 it seems to have been taken for granted that such inspections are within the proper exercise of the police power. The first case which directly met the issue was *District of Columbia v. Little.*[7] Defendant in that case was convicted of interfering with a health inspector who had attempted without a warrant to make an inspection of defendant's dwelling upon receipt of a complaint alleging the existence

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[1] This habeas corpus proceeding should have been captioned: "In the Matter of the Petition for a Writ of Habeas Corpus by Earl Taylor." State *ex rel.* Smilack v. Bushong, Sup't, 93 Ohio App. 201, 112 N.E.2d 675 (1952), *aff'd,* 159 Ohio St. 259 (1953). Eaton was Taylor's attorney.

[2] DAYTON, OHIO, CODE OF GENERAL ORDINANCES, no. 18099, § 806-30 (1954).

[3] As of 1955 more than seventy cities had comprehensive housing codes. Gazzolo, *Municipal Housing Code,* THE MUNICIPAL YEAR BOOK 317 (1956).

[4] SIEGEL & BROOKS, SLUM PREVENTION THROUGH CONSERVATION AND REHABILITATION 18 (1953).

[5] *Id.* at 1.

[6] HHFA, URBAN RENEWAL BULL. No. 3 (1956). From a total of fifty-seven housing codes included in the study it was found that thirty-eight authorized a right of entry onto the premises while forty-four had provisions permitting inspection.

[7] 178 F.2d 13 (D.C. Cir. 1949).

of unsanitary conditions therein. The court of appeals held that the regulation authorizing the inspection was unconstitutional.[8] This court regarded an inspection by a health officer as no different, in essence, than a search for evidence of crime. In the area of criminal investigations the Supreme Court has firmly established the requirement under the fourth amendment that, in the absence of special exigencies during the performance of duty, a search warrant must be obtained prior to an invasion of the privacy of a man's home.[9]

A 1956 Maryland Court of Appeals decision[10] upheld a conviction where appellant had refused to allow an attempted inspection of his rooming house in accordance with provisions of the Baltimore City Code.[11] The court asserted that such inspections do not constitute a violation of the due process clause of the fourteenth amendment nor of the state constitutional provision corresponding to the fourth amendment. The holding was based on the proposition that the constitutional guarantees against unreasonable searches and seizures do not prohibit *reasonable* searches and seizures.[12]

Aside from a South Carolina dictum which expressed the opinion that ". . . there is doubt whether such an entrance [over the objection of the occupant] would come within the constitutional guarantees against unreasonable searches . . . ,"[13] the District of Columbia, Maryland and Ohio cases appear to be the only reported decisions which have considered the legality of making an inspection of this type without a warrant.

The "reasonableness" of a regulation promulgated under the police power of the state is measured by weighing the importance of the public benefit which the legislation seeks to promote against the seriousness of the imposition on the rights of those being regulated.[14] If a right of entry is necessary for effective enforcement of housing codes,[15] what minimum safeguards are essential to protect the individual from unreasonable invasions of his right of privacy? Certainly the use of a

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[8] *Aff'd on nonconstitutional grounds,* 339 U.S. 1 (1949). The Supreme Court held ". . . that respondent's statements to the officer were not an 'interference' that made her guilty of a misdemeanor under the controlling District law." At the present time there is no ruling of the Supreme Court of the United States as to whether in federal jurisdictions a housing inspection may lawfully be made without a search warrant.

[9] United States v. Jeffers, 348 U.S. 48 (1951); McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Thurman v. State, 116 Fla. 426, 156 So. 484 (1934); People v. Schmoll, 383 Ill. 280, 48 N.E.2d 933 (1943); State v. Munger, 43 Wyo. 404, 4 P.2d 1094 (1931).

[10] Givner v. State, 210 Md. 484, 124 A.2d 764 (1956).

[11] BALTIMORE, MD., CITY CODE art. 12, § 120; art. 5, § 120, ch. 12, para. 1202; art. 9, § 260 (1950).

[12] United States v. Rabinowitz, 339 U.S. 56 (1950).

[13] Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955).

[14] Dederick v. Smith, 88 N.H. 63, 184 Atl. 595, *appeal dismissed,* 229 U.S. 506 (1936).

[15] See note 6 *supra.*

search warrant where the occupant refuses entry is not the only means of preserving the inviolability of a man's castle. Indeed, under present law the use of a search warrant for housing inspections is in many cases neither possible nor practicable.[16]

The code provision involved in *Givner v. State* authorized the inspector to demand entry only during daylight hours; and the ordinance in question in the *Eaton* case permitted the inspection "at any reasonable hour." It is submitted that any inspection authorized under the provisions of a housing code should be limited to reasonable hours. In the absence of extreme emergency an occupant should not be compelled to submit to an inspection under circumstances of undue inconvenience.[17]

Another provision common to the ordinances involved in the two above-mentioned cases is that the inspector must exhibit proper identifying credentials before requesting entry. That a person has a right to be apprised of the authority under which an inspector demands to enter his home is so well settled as to require no further discussion.[18]

In addition, the Maryland and Ohio courts require that the inspections shall not be used "as a cover to conduct a search for any violations of the criminal law or for any purpose other than the preservation of health and safety. . . ."[19] Judge Herbert, in *Eaton v. Price*, takes special note of the fact that under the Dayton ordinance a prosecution for failure to remedy the violations observed on the first inspection or for failure to comply with an order to vacate must be based upon evidence obtained on a *reinspection*. Whether a prosecution based upon evidence obtained on this reinspection, if the latter were made without a warrant and against the will of the occupant, would be valid was not before the court and remains undecided.[20] The clear implication is that

[16] In his dissent in District of Columbia v. Little, *supra* note 7, at 23, Judge Holtzoff discusses the problem: ". . . there is no existing statute under which a health inspector, a plumbing inspector, or a building inspector may obtain a warrant authorizing him to enter a building for the purpose of a routine inspection. It has always been assumed that no search warrant is necessary. . . . Moreover, even if an Act providing for such search warrants should be placed on the statute books, how can an inspector make a showing of probable cause as a basis for the issuance of a warrant for the purpose of an ordinary, routine inspection?" Comprehensive inspections on an area-by-area basis have proved more effective than haphazard inspections based only upon receipt of complaints. SIEGEL & BROOKS, *supra* note 4, at 11, 52-53.

[17] See United States v. Crescent-Kelvan Co., 164 F.2d 582 (3d Cir. 1948). No constitutional right is violated by a statue, an ordinance, or a regulation providing for the inspection, *during business hours*, of places of business dealing with drugs or food.

[18] Goodman v. State, 178 Md. 1, 11 A.2d 635 (1940). The purpose of service of a search warrant is not only to authorize officer to make search, but to inform the one named and suspected, if he is on the premises, of what is being done and why.

[19] Givner v. State, *supra* note 10, at 503, 124 A.2d at 774.

[20] State *ex rel.* Eaton v. Price, 168 Ohio St. 123, 137, 151 N.E.2d 523, 532 (1958).

the information gathered upon the *original* inspection conducted without a warrant is not to be used in a criminal prosecution, not even in a proceeding under the penal provisions of the ordinance which authorized the inspection.

Although it is not explicit in the opinion, the Court of Appeals for the District of Columbia may have been influenced somewhat in its decision of the *Little* case by the vague wording which characterized the code provision. In sharp contrast with the Baltimore and Dayton codes, the District of Columbia regulation required neither a showing of credentials nor an inspection at a reasonable hour.

The Maryland and Ohio courts have decided that inspections of private dwellings conducted under the authority of housing codes are not unreasonable invasions of the privacy of the home provided that the following minimum requirements are met: (1) inspections may be made only at reasonable hours; (2) inspectors must properly identify themselves; and (3) evidence obtained during the original inspection may not be used as a basis for criminal prosecution. Housing codes are designed to preserve the health and safety of our communities. It would appear that the home owner's right to privacy must yield to this extent in favor of the public interest.

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