EVIDENCE SEIZED BY FIRE MARSHAL WITHOUT SEARCH WARRANT HELD INADMISSIBLE

State v. Buxton,

148 N.E.2d 547 (Ind. 1958)

While a deputy state fire marshal, a member of the National Board of Fire Underwriters and a state police photographer were investigating a fire which extensively burned the interior of a restaurant building, they discovered a hole in the floor containing a hot plate, the cord for the hot plate, a pile of torn newspapers and a gunny sack soaked in fuel oil. These materials were seized as evidence in an arson prosecution against Buxton, the restaurant owner. The evidence was excluded and Buxton acquitted because it had been obtained in violation of the Indiana constitutional provision against unreasonable search and seizure,[1] the investigation having been conducted without a search warrant.[2]

The constitutional protection of person and property from unreasonable searches and seizures[3] is one of the rights which distinguishes this country from the police states of the world today. But even this country has not always had this protection. In England and the American colonies a practice had developed whereby officers of the King might obtain writs of assistance[4] which permitted them to enter any and all places at will, to search and seize such papers and evidence as they pleased. Such breaches of privacy were tolerated because of "necessity," to enforce the law, but in the monumental English case of *Entick v. Carrington,*[5] these instruments of outrage were held invalid.

The facts of this case present two distinct problems: (1) Is such a search as this without a warrant an unreasonable search? (2) If so, are the material and information thus obtained admissible in evidence in

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[1] IND. CONST. art. 1, § 11, State v. Buxton, 148 N.E.2d 547 (Ind. 1958); Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952); Dearing v. State, 226 Ind. 273, 79 N.E.2d 535 (1948); Batts v. State, 194 Ind. 609, 144 N.E. 23 (1924); Flum v. State, 193 Ind. 585, 141 N.E. 353 (1923); Callender v. State, 193 Ind. 91, 138 N.E. 817 (1923).

[2] State v. Buxton, *supra* note 1. See Idol v. State, 233 Ind. 307, 119 N.E.2d 428 (1954).

[3] U.S. CONST. amend. IV; IND. CONST. art. 1, § 11.

[4] Authorized by the statute of 12 CHAS. 11 (1672).

[5] 19 How. St. Tr. 1029 (1765). Here was founded the doctrine, "Every man's home is his castle." For an excellent discussion of the historical background of this doctrine, both in England and the United States, see People v. Marxhausen, 204 Mich. 559, 563-66, 171 N.W. 557, 558-59 (1919). Speaking of the rejection of the writs of assistance in Boston in 1761, John Adams wrote in a letter to William Tudor, March 29, 1817, which may be found at 10 LIFE AND WORKS OF JOHN ADAMS 244, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

a criminal prosecution? Neither problem admits of ready solution.

The first problem must be approached by attempting to balance the right of the individual to privacy against the obligation of the government to protect its citizens. With respect to the individual, we must consider what right was invaded and to what extent. As to the state, consideration must be given to the appropriateness of the intervention and the particular public interest that is being protected.[6]

The court resolved the balance in favor of Buxton. The state had relied on the facts that the state fire marshal law,[7] although authorizing and directing that fires be investigated, did not specifically require a warrant, and that this statute was designed to protect the safety and well-being of all the persons as guaranteed by the state constitution.[8] The court, however, held that although the safety of the people prevails over private rights, such safety provisions as these may readily be effected without resort to violation of these rights.[9]

There was an invasion of Buxton's privacy by an investigation undertaken without the officers' having acquired a search warrant based upon a showing of probable cause that there was a violation of law. It does not seem that the magnitude of this intrusion is analogous to that of the odious writ of assistance. It is, on the contrary, probable that the owner of property destroyed by fire would welcome assistance in determining the cause of destruction. There was little invasion of privacy inasmuch as the building was not in use because of the fire damage and Buxton certainly gave no appearance of objection to the investigation. When the officials arrived at 10:00 a.m., which is not an unreasonable time, they found the door unlocked. Buxton arrived later, talked with the investigators without protesting, and then departed. The inference is that neither the officers nor Buxton felt there was anything unreasonable about this investigation. It is true that we all have "the right to be let alone,"[10] but it is only unreasonable searches and seizures which are prohibited.[11] These officers were investigating the property with a view principally toward the prevention of future fires. Buxton's interest in this is as great as that of the state. A search of this nature can hardly be called unreasonable to the owner.

The state's position is that prompt and thorough investigation of all fires is essential for the safety of the people. No doubt, everyone would

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6 For development of this approach, see STRONG, AMERICAN CONSTITUTIONAL LAW 755-860 (1950).

7 IND. ANN. STAT. §§ 20-802 to -820 (1950).

8 IND. CONST. art. 1, § 1, provides, among other things: "[A]ll power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, *safety*, and *well-being* . . . ." (Italics added.)

9 State v. Buxton, *supra* note 1.

10 Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissent).

11 Johnson v. United States, 333 U.S. 10 (1947); Harris v. United States, 331 U.S. 145 (1947); Carroll v. United States, 267 U.S. 132 (1925).

concede that this is desirable. It was further argued, however, that a routine investigation must be permitted without a search warrant inasmuch as the cause of fire is initially unknown, rendering it impossible to fulfill the constitutional requirement of probable cause[12] upon which the warrant may issue. It was clearly the legislative will that all fires be investigated, even when there is the strongest ground for belief of the innocence of all parties concerned, for probably the principal reason for investigation is its aid in prevention of future fire losses. This is not the sort of cry of "necessity" which led to the abuse of the writs of assistance, but a reasonable regulation, essential for effective protection of the safety of the people. The right to investigate to determine the cause of fires does not confer on the officers of the state license to exercise arbitrary power to trespass upon any and all places at their whim as did the infamous general writs. It is true that this statute describes no premises and names no persons specifically, but the right of investigation is obviously limited both as to time and place; *i.e.*, it must be prompt, and must be restricted to the immediate premises burned.

The state's police powers permit reasonable regulations notwithstanding the constitutional safeguard against unreasonable search and seizure and there are a number of cases where inspection has been permitted without requiring a search warrant.[13] The court here distinguished these cases by the fact that they exemplify situations where a civil, rather than a criminal, investigation was permitted. Thus it must be considered whether an investigation to determine the cause of fire is a criminal or civil investigation, that is, whether its primary purpose is to prevent future fires and attendant losses or to apprehend arsonists. Both purposes are included by the express words of the fire marshal law.[14] It seems, though, that it would be grossly unfair to property owners to hold that the principal basis for investigation is to see if criminal intent can be ascribed when their buildings have burned. The United States Supreme Court recently held that an Ohio fire marshal's interrogation of witnesses to determine the origin of fire was not a criminal trial but "a proceeding solely to elicit facts relating to the causes and circumstances of the fire."[15] This was true even though, if sufficient evidence was produced to warrant a charge of arson, the result of the hearing might be an arrest. The basic aim of both the Ohio and the Indiana statutes authorizing the investigations seems to be, not the appre-

[12] IND. CONST. art. I, § 11, provides that "[N]o warrant shall issue, but upon probable cause. . . ." See Callender v. State, *supra* note 1. *Cf.* Shore v. United States, 49 F.2d 519, 521 (D.C. Cir. 1931), where the court indicated that ordinarily proof of probable cause requires a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious man in believing a party is guilty of an offense charged.

[13] See cases listed in State v. Buxton, *supra* note 1, at 551 n. 5. See also 79 C.J.S. *Searches and Seizures* § 6 (1952) and cases cited.

[14] See note 7, *supra*.

[15] *In re* Groban, 352 U.S. 330, 332 (1957).

hension of criminals, but "the expeditious and expert ascertainment of the causes of fire" by the "chief guardian of a community against the hazards of fire."[16]

Looking to the method, rather than the result, it seems that this investigation was a perfectly valid civil inspection and the officers were legally on the premises. Had they discovered the incriminating evidence while Buxton was with them, having probable cause to believe he had started the fire, they could have arrested him without a warrant.[17] Then it would have been permissible to seize the evidence, for it is acceptable to search for and seize evidence without a warrant where an arrest is made and when the premises are under control of the person arrested.[18] This is not unreasonable. Seizure should, by analogy, be proper without an immediate arrest. In the instant case, seizure was merely incidental to the civil inspection, as, likewise it would be only incidental to an arrest, in which case it would be proper.

The court, however, decided that the search and seizure was unreasonable, raising the second question: whether material and information so obtained should be admitted into evidence. There is an understandable difference of opinion on this issue in the federal courts and those of the several states[19] for much may be said in favor of either view. The problem basically is whether officers of the law should have unlimited freedom subject only to criminal prosecution or the action of trespass against them if they violate the constitutional provisions of unreasonable search and seizure. Or whether, in order to prevent any interference with such constitutional guarantee, convicting evidence should be rejected because an officer has blundered.[20]

A slight majority of the states[21] today favor the common-law or orthodox view that such evidence should be admitted. They feel that a

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16 *Id.* at 336 (concurring opinion).

17 Johns v. State, 235 Ind. 464, 134 N.E.2d 552 (1956); Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954).

18 United States v. Rabinowitz, 339 U.S. 56 (1950); Agnello v. United States, 269 U.S. 20 (1925); Carroll v. United States, *supra* note 11; Boyd v. United States, 116 U.S. 616 (1886); Henderson v. State, 235 Ind. 134, 131 N.E.2d 326 (1956).

19 The common-law rule admitting such evidence is followed in 26 states. In two of these, Alabama and Maryland, the exclusionary rule is required by statute for certain circumstances, but the common-law rule is followed for all other situations not covered by the statutes. Such evidence is excluded in the federal courts and 22 states. In three of these states the rule is required by statute. The exclusionary rule also prevails in the District of Columbia, Alaska, and Hawaii. For a comprehensive coverage of this problem, a state-by-state analysis, and citations of cases, see Annot. 50 A.L.R.2d 531 (1956). The only change since this annotation is that in Rhode Island a statute was enacted in 1955, providing that evidence obtained by illegal search shall be inadmissible, reversing State v. Olynik, 83 R.I. 31, 113 A.2d 123 (1955). R.I. GEN. LAWS ANN. tit. 9, c. 19 § 25 (1956), State v. Hillman, 125 A.2d 94 (R.I. 1956). See also Note, 31 NOTRE DAME LAW. 85 (1955).

20 Note, 3 OHIO ST. L.J. 73, 77 (1936).

21 See note 19, *supra*.

guilty criminal should not be released because of the arresting officer's blunder. It is contended that the constitutional provision can be adequately enforced by criminal prosecution against violators or by civil action against the trespassing officers.[22]

The proponents of the federal or exclusionary rule[23] contend that "the most effective way to protect the guarantees against unreasonable search and seizure and compelling self-incrimination is to exclude from evidence any matter obtained by a violation of them."[24] It is argued that any other sanctions against arbitrary searches and seizures are wholly ineffective and present no deterrent to overzealous law enforcement officers.[25] Recently the trend has been slowly towards the rule excluding such evidence,[26] as indicated by the fact that at least the last three states to change their position on this issue have adopted this view.[27]

In states which follow the exclusion rule, it is especially imperative that the court make a careful analysis of the facts and circumstances of each case to be certain that the search and seizure is unreasonable before rejecting the evidence and setting free a man known to be guilty.

Robert E. Lewis

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[22] People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

[23] Weeks v. United States, 232 U.S. 383, 391-92 (1914).

[24] Rickards v. State, 45 Del. 573, 585, 77 A.2d 199, 205 (1950).

[25] For a strong statement of this position see the dissent of Mr. Justice Murphy in Wolf v. Colorado, 338 U.S. 25, 41-47 (1949).

[26] Note, 31 NOTRE DAME LAW. 85 (1955).

[27] People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); Rickards v. State, *supra* note 24; State v. Hillman, *supra* note 19, required exclusion because a new statute was enacted immediately after the court of Rhode Island, in first stating its position, had adopted the common-law rule of admissibility.