Montana Law Review

Volume 28
Issue 1 *Fall 1966*

Article 7

7-1-1966

Search and Seizure: Search of Bodily Cavities (Blefare v. United States, 9th Cir. 1966)

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> . . . . who can explain why an individual who is anesthetized [during an operation] should be charged with knowledge that his surgeon failed to remove an object which he had placed in the incision? In fact, who can explain why a person should be charged with knowledge of anything that is unknown or unknowable?

It is illogical and unjust to bar a claim because a person did not discover a wrong which is of its very nature "inherently unknowable,"[53] such as a sponge closed in an incision. The rejection of the wrongful act rule by the court in the instant case was a choice between the jeopardy which practitioners may face in defending old claims and affording a claimant an opportunity for a day in court. In choosing the latter, Montana has adopted a modern minority rule which is rooted in the basic legal maxim: "For every wrong there is a remedy."[54]

EARL J. HANSON.

SEARCH AND SEIZURE: SEARCH OF BODILY CAVITIES.—Defendants John Blefare and Donald Michel were convicted in federal district court of smuggling heroin. They had been stopped and searched by Customs agents, who had reliable information that the defendants were coming across the border from Mexico with heroin in their stomachs. The heroin was recovered from Blefare by restraining him sufficiently to pass a tube through his nose and into his stomach to allow the introduction of an emetic. The two packets of heroin thus recovered were received in evidence over the objection of defendants. On appeal to federal circuit court, defendants claimed the method of obtaining the heroin was violative of their Federal Constitutional rights and the packets should not have been admitted into evidence. *Held:* Convictions affirmed. The procedure used to obtain the packets was not unreasonable, and did not violate "due process." *Blefare v. United States,* 362 F.2d 870 (9th Cir. 1966).

In affirming the reasonableness of the search the majority cites no specific standards, but rather confines itself to an analysis of the facts. The concurring opinion helpfully points out in a footnote that the court was applying the standard of reasonableness first laid down in *Boyd v.*

[53]The phrase "inherently unknowable" harm was first used by Justice Rutledge in Urie v. Thompson, 337 U.S. 163, 169 (1949) in reference to the time of discovery of the disease of silicosis as covered by the Federal Employer's Liability Act. Justice Rutledge in rejecting the wrongful act rule, stated:

> [m]echanical analysis of the accrual of petitioner's injury—whether breath by breath, or at one unrecorded moment in the progress of the disease—can only serve to thwart the congressional purpose . . . . It would mean that at some past moment in tife, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge . . . .

[54]R.C.M. 1947, § 49-115 provides: "For every wrong there is a remedy."

United States[1] as it has been interpreted by subsequent decisions such as *Mapp v. Ohio*,[2] and *Ker v. California*.[3]

Boyd v. United States purportedly established constitutional standards of reasonableness in the area of federal search and seizure.[4] An analysis of *Boyd* and subsequent Fourth Amendment decisions reveals that the constitutional standard of reasonableness is fairly rigid in its formulation, but unusually flexible in its application.[5] A legal search may be made for an object subject to forfeiture if a valid warrant is issued for its seizure, or if the search is made incident to a lawful arrest.[6] If these criteria are fulfilled and the seizure is made within the scope of the authority thus granted, the seizure is reasonable.[7] A failure to fulfill these criteria makes the search unreasonable.[8] However, the definitional elements of the standard are not fixed. Thus in the individual case there is a question as to whether the elements of the standard apply to the

[1]116 U.S. 616, (1886).

> The majority opinion in the Boyd case is one of those curious documents the whole of which is much superior to the sum of its parts. While the decision has exerted an enormous influence on the entire subsequent course of the Fourth Amendment's interpretation, some of Bradley's reasoning fails to stand up under close scrutiny. . . . [R]are indeed is the search opinion to which the Boyd case is relevant which does not cite it as precedent. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 56,57 (1966).
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> 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. U.S. CONST. amend. IV.

[2]367 U.S. 643 (1961).

[3]374 U.S. 23 (1963).

[4]Professor Wigmore claims that while the decision in *Boyd* was correct on the basis of the Fifth Amediment, it came to two fallacious conclusions: first, holding that compulsory production of the papers involved constituted search and seizure; and second, holding that the admission of such papers as evidence was "unconstitutional." In doing this Wigmore claims that the Court violated a fundamental principle of evidence. That is: "A judge does not attempt, in the course of a specific litigation, to investigate and punish all offenses which incidentally cross the path of that litigation." 8 WIGMORE, EVIDENCE §§ 2184a, 2183 at 6,7 (McNaughton rev. 1961).

[5]See especially, Gouled v. United States, 255 U.S. 298 (1921), and *Ker v. California*, *supra* note 3.

[6]A search warrant must particularly describe the item, and it must describe something which the government has a right to because it is the friut of a crime, or related item. The warrant cannot describe mere evidence. *Boyd v. United States*, *supra* note 1. If the search is made incident to an arrest, then the scope is extended to greater limits, and mere evidence may be seized. Harris v. United States, 331 U.S. 145 (1947); United States v. Rabinowitz, 339 U.S. 56 (1950).

> The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized," searches, and seizures made under them, are to be regarded as not unreasonable, and therefor not prohibited by the Amendment. *Gouled v. United States, supra* note 5, at 308.

However there is no indication in the instant case that the search was incident to an arrest, or that a search warrant was issued. In Rivas v. United States, No. 20,556, 9th Cir., November 8, 1966, a later Ninth Circuit decision by the concurring judge in the instant case, Barnes, J., concluded: "The United States Government has an absolute right to a border search and no probable cause is necessary." There is tentative support for such a special border rule in Carroll v. United States, 267 U.S. 132, 154 (1925). See also *Boyd v. United States*, *supra* note 1, at 623.

[7]*United States v. Rabinowitz, supra* note 6, at 61.

[8]*Gouled v. United States, supra* note 5, at 308.

facts. As noted in *Ker* the standard is "not susceptible of Procrustean application."[9]

The court in the instant case separates its analysis of reasonableness as dictated by the Fourth Amendment from its consideration of the claim that appellants were denied due process of law. Without stating explicit standards the majority rejects appellants' contention that they had been denied due process of law. However, the failure to announce specific standards is not surprising since the Supreme Court's pronouncements in this area have been consistently vague. The Supreme Court has said that while the standard "precludes defining" that the "vague contours of the Due Process Clause do not leave judges at large."[10] In the words of Mr. Justice Cardozo, due process is a guarantee of respect for those personal rights and immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[11] and as such, are "implicit in the concept of ordered liberty."[12]

In the area of search and seizure, as well as other areas, the Court has intentionally avoided defining or limiting due process.[13] However a piecemeal application of the Bill of Rights to the states through the Fourteenth Amendment has given some specific content to the concept of due process. Specifically, in *Nat. Safe Dep. Co. v. Illinois*,[14] it was held that unreasonable search and seizure by state officials was not barred by the Constitution since the Fourth Amendment did not apply to the states. However, in 1949, the Court in *Wolf v. Colorado*[15] held that the "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment" was required by the due process clause of the Fourteenth Amendment.[16] The Court did not apply the exclusionary rule to the states, although it had been applied in conjunction with the Fourth Amendment on the federal level.[17] In 1961, *Wolf* was overruled on this latter point, and in *Mapp v. Ohio*[18] it was held that evidence gathered in an unreasonable search and seizure was to be excluded from state as well as federal courts. *Ker v. California* held that it would be the federal standard of reasonableness which would be applied to the states, and that this was the constitutional standard.[19]

[9]*Ker v. California, supra* note 3, at 33.

[10]Rochin v. California, 342 U.S. 165, 170 (1952).
"Nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.
"Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

[11]Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[12]Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[13]*Rochin v. California, supra* note 10, at 171.

[14]232 U.S. 58 (1914).

[15]338 U.S. 25 (1949).

[16]*Id.* at 27-28.

[17]*Ibid.;* Weeks v. United States, 232 U.S. 383 (1913).

[18]*Supra* note 2, at 654-55.

[19]*Supra* note 3.

Between the *Wolf* and *Mapp* decisions due process was given an additional interpretation in *Rochin v. California*.[20] There, state officers, without the legal authority of a warrant, invaded the privacy of Rochin's home after receiving a tip that he was a narcotics dealer. The officers then broke into his bedroom where they saw two capsules on a nightstand. When the defendant put these into his mouth, the officers jumped him in an effort to remove the drugs. When this failed, the removal was accomplished by the use of a stomach pump similar to the one used in the instant case. At the trial the capsules, containing morphine, were received into evidence. Rochin's subsequent conviction was reversed by the Supreme Court. Although it was clearly a search and seizure question, Mr. Justice Frankfurter wrote the majority opinion without mentioning the *Wolf* decision, which he had authored three years before. He stated that the petitioner had been denied due process of law because the police conduct had offended "those canons of decency and fairness which express the notions of justice of English speaking people toward those charged with even the most heinous offenses."[21] In other words it was conduct which "shocked the conscience."

Thus the court in *Blefare* faced possibly two different criteria for judging the agents' conduct: Was the search and seizure unreasonable? Did the conduct of the agents deny the petitioners due process of law? Since it is not clear whether or not they proscribe the same conduct, the court considered both.

Although the majority opinion in *Blefare* did not specifically cite *Boyd* it appears to have applied the federal standard of reasonableness.[22] The district court had held that the criteria for a reasonable search and seizure had been fulfilled. In upholding this finding the circuit court noted that where an international border is crossed, mere suspicion has been held sufficient cause for search.[23] The agents here knew that Blefare had smuggled dope in his stomach before, and had information that he was in Mexico planning to do it again.[24] The hereoin, as contraband, was subject to seizure.[25] Thus the agents had the legal right to seize the packets when Blefare reached the border.[26] The circuit court went on to point out that apparently every reasonable alternative, consistent with the recovery of the heroin, had been tried before the use of the tube.[27]

[20]*Supra* note 10.

[21]*Rochin v. California, supra* note 10, at 169, quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945).

[22]This is confirmed by the concurring judge. Instant case at 876-77.

[23]Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959); See also *supra* note 6.

[24]Instant case at 871. The information was obtained from other Customs agents and the Royal Canadian Mounted Police, who had somehow personally obtained it from Blefare.

[25]*Boyd v. United States, supra* note 1. See also *supra* note 6.

[26]*Cervantes v. United States, supra* note 23.

[27]The use by the police of a reasonable method of search, as such, does not appear to be required by the Fourth Amendment. See McGuire v. United States, 273 U.S. 95 (1927); On Lee v. United States, 343 U.S. 747, 751-53 (1952). *Cf. United States v. Rabinowitz, supra* note 6. A reasonable search of the body may be required by due process. *Rochin v. California, supra* note 10.

Under these circumstances the search and the seizure of the heroin was reasonable under the Fourth Amendment.

The finding that the search was legal was also used to distinguish the conduct here from the standard of due process established in *Rochin*. The majority in *Blefare* claimed it was the entire sequence of events in *Rochin* which "shocked the conscience" of the Supreme Court.[28] The majority implies that since the original entry in *Rochin* was unlawful, that each of the subsequent events was thereby made unreasonable.[29] Since the police had no legal authority, there was no justification for use of any force, and thus their conduct became *in toto* a violation of the defendant's right to due process of the law. In the instant case the element of brutality, which appears to be part of the *Rochin* standard, was of no consequence because the original search was lawful.[30]

Judge Ely, in his dissent, stated that the standards of the *Rochin* decision had been violated. "The search procedure which my Brothers condone was, if not savage, so repugnant to the provisions of the Fourth and Fifth Amendments as to offend my judicial sensibility."[31] He notes the procedure was so revolting that one of the Customs agents suffered an attack of nausea and was forced to leave the search room.[32]

The Supreme Court's interpretation of the Fourth Amendment as of the date of the instant case would appear to uphold the seizure of drugs in the manner employed by these agents. Further, it seems probable that surgery to recover narcotics concealed within the body would be constitutionally permissible.[33] On the other hand, the Supreme Court in *Miranda v. Arizona*,[34] decided after *Blefare*, held the creation of even a coercive atmosphere during a police interrogation violated the Fifth Amendment privilege against self-incrimination. The paradox which is thereby brought to light may best be framed in the language of Mr. Justice Frankfurter:

> It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order

[28]The court quotes the facts from *Rochin*: "Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government is bound to offend even hardened sensibilities." Instant case at 875.

[29]Commenting on *Rochin* the court notes: "In furtherance of their illegal entry and search they then took him to a hospital where an emetic was forced into his stomach." Instant case at 875.

[30]"Here a border search was in progress. The officers had every right to search for contraband. They had knowledge from which they were entitled to conclude that narcotics were present in the stomach [*sic*] of the two suspects." Instant case at 876.

[31]Instant case at 880.

[32]*Ibid.*

[33]Judge Barnes, who concurred in the instant case, referred to the taking of a blood sample as a "surgical procedure." Instant case at 876. Such a "search" has been upheld by the Supreme Court. Breithaupt v. Abram, 352 U.S. 432 (1957); Schmerber v. California, 86 Sup. Ct. 1826 (1966).

[34]86 Sup. Ct. 1602 (1966).

> to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.[35]

A partial answer to this paradox was recently hinted at by the Supreme Court. In *Schmerber v. California*[36] the court implied that a different standard of reasonableness might be used where the search is extended beneath the surface of the body. Although in *Schmerber* the orthodox standard was used, the Court warned:

> That we today hold that the Constitution does not forbid minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.[37]

As indicated in *Schmerber* the traditional Fourth Amendment standards of reasonableness, which if fulfilled give an absolute right to seize, do not appear adequate where there is a medical search of the body. If such a search is to be permitted at all, it is submitted that due process of law demands more stringent criteria than the permissive standards laid down by the instant case. A medical search involves not only an invasion of privacy, but also a serious invasion of personal dignity coexistent with the potential of bodily harm or death.[38]

If the *Rochin* standard is similar to the one applied by the dissenting judge then due process of law requires more than just an incorporation of Fourth Amendment standards of reasonableness. However the history of due process is one of flexible application.[39] The language of the *Rochin* decision itself indicates this:

> To believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggset that the most important aspect of Constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior.[40]

The Court in *Rochin* was shocked because the conduct was brutal. It is submitted that the conduct here was equally brutal and equally

[35] *Rochin v. California, supra* note 10, at 173.

[36] *Supra* note 33, at 1835. The Court discusses the scope of an external search and then comments: "Whatever the validity of these considerations in general, they have little applicability with respect to searches beyond the body's surface."

[37] *Supra* note 33, at 1836.

[38] Such invasions were apparent here. The procedure for introducing a "stomach tube" such as used here is as follows:

> The catheter should be lubricated with mineral oil and gently introduced through the nose; when the pharnyx is reached the patient is given a glass of water and a straw and instructed to swallow. The tube can be inserted without difficulty while the patient swallows the water. After the tube has reached the stomach a syringe is attached and the gastric contents are aspirated." CHRISTOPHER, TEXTBOOK OF SURGERY 1593 (2nd ed. 1939).

Where all witnesses agree that Blefare struggled violently and was forcibly restrained by at least three agents, (Instant case at 882), could there have been either a safe procedure, or one where the defendant would be allowed to maintain any dignity?

[39] See, Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737 (1922).

[40] *Rochin v. California, supra* note 10, at 171.

capable of "brutalizing the temper of society." However a standard couched in terms of brutality appears to be a poor one. In most instances its application would depend on the conduct initiated by the subject rather than the police. Protection would be afforded primarily to those who resisted. A better standard would appear to be based on a balancing of the interests involved. Society's reason for the search should be balanced against the potential invasion of privacy and other risks to the individual searched.[41] Such criteria should be in addition to, and not a substitution for, traditional Fourth Amendment standards.

It is recognized that any such expansion of personal rights probably would involve the freeing of some obviously guilty individuals. However, the standard thus laid down would provide criteria regulating police conduct toward the innocent as well as the guilty. It is important that the criminal element of society be controlled, but in the words of F. B. I. Director J. Edgar Hoover:

> Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.[42]

JAMES POORE.

INTESTATE SUCCESSION: STEPCHILD MAY INHERIT UNDER A STATUTE PROVIDING THAT THERE IS NO DISTINCTION BETWEEN KINDRED OF THE WHOLE AND HALF BLOOD.—William F. Humphrey died intestate, leaving as survivors his two brothers, several children of deceased brothers, and a stepdaughter who was the natural daughter by a former marriage of his deceased wife. When a nephew was appointed administrator of the estate, the stepdaughter filed a cross-petition to revoke the letters of administration and establish herself as administratrix. On motion to dismiss the cross-petition, *held,* denied. Under a statute eliminating the common law distinction between kindred of the whole and half blood, a stepchild may inherit from a stepparent who dies intestate. *In re Estate of Humphrey,* 254 F. Supp. 33 (D. D. C. 1966).[1]

[41]Recently the Supreme Court applied a similar test in Griswold v. Connecticut, 381 U.S. 479 (1965). There the Court found the possibility that the law would allow police to search the marital bedroom for signs of the use of contraceptives to be repulsive to our notions of privacy, and hence, held the Connecticut contraceptive law unconstitutional. Perhaps the drug laws should be examined with similar considerations in mind by both the Court and the Congress.

[42]Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI,* 37 IOWA L. REV. 175, 177 (1952).

[1]A "stepchild" is the son or daughter of one's wife by a former husband, or of one's husband by a former wife. *In re* Estate of Smith, 49 Wash.2d 229, 299 P.2d 550, 63 A.L.R.2d 299 (1956). "Half blood" is a term denoting the degree of relationship which exists between those who have the same father or the same mother, but not both parents in common. BLACK, LAW DICTIONARY (4th ed. 1951).