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Constitutional Law - Criminal Law - Fourth Amendment - "Mere Evidence Rule"

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RECENT DECISIONS

CONSTITUTIONAL LAW—CRIMINAL LAW—Fourth Amendment—"Mere Evidence Rule"—The distinction between instrumentalities, contraband, fruits of the crime and evidentiary objects has been abolished and evidentiary objects may now be searched for and seized if the search is reasonable and if the officers have probable cause to believe that such seizure will lead to apprehension or conviction.

Warden, Maryland Penitentiary v. Hayden, 87 S. Ct. 1642 (1967).

Petitioner was tried for armed robbery of a cab company office. He was followed from the office by two drivers who saw him enter a house. The two men notified police who entered the house, arrested the petitioner in an upstairs bedroom and seized a shotgun and pistol found in the bedroom; ammunition was found in the bedroom. Another officer found the clothing of the peitioner in the washing machine in the basement. Hayden was convicted in a non-jury trial in the Criminal Court of Baltimore. The guns, ammunition and clothing were admitted at the trial, petitioner having made no objection to their admission. Hayden did not appeal but did petition for relief under the Maryland Post Conviction Procedure Act[1] asserting for the first time the illegality of the forcible entry and search of his home.[2] This petition was denied without hearing testimony. Petitioner appealed this decision and the Maryland Court of Appeals remanded the case for an evidentiary hearing stating that the denial of post conviction relief could not be based on the fact that the petitioner had not raised the issue of "illegal search and seizure, and consequent arrest without a warrant"[3] at the trial. The post conviction judge decided that Mrs. Hayden "gave the police permission to enter the home"[4] and that the search was reasonable. Petitioner again appealed to the Maryland Court of Appeals but withdrew the application and filed this habeas corpus proceeding. The United States District Court held the search and seizure valid.[5] Petitioner appealed this decision to the United States Court of Appeals for the Fourth Circuit where a three judge panel reversed the District court, one judge dissenting.[6] Majority and dissenting opinions stated that the entry and arrest were lawful because the officers

1. MD. STAT. ANN. art. 27, § 645A (Supp. 1966).

2. Hayden v. Warden, Maryland Penitentiary, 233 Md. 613, 195 A.2d 692 (1963).

3. *Id.*

4. Warden, Maryland Penitentiary v. Hayden, 87 S. Ct. 1642, 1645 & n.4 (1967). Note 4 points out that the federal habeas corpus court did not believe that Mrs. Hayden's permission was needed under the circumstances.

5. Brief for Appellant at 4, Warden, Maryland Penitentiary v. Hayden, 87 S. Ct. 1642 (1967).

6. 363 F.2d 647 (4th Cir. 1966).

were in "hot pursuit."[7] The majority held that the search was a reasonable one, stating that it "did not exceed the broad limits tolerated in *Harris v. United States*, . . . where the Supreme Court affirmed the validity of an intensive five-hour search of all four rooms of an apartment . . . incident to a lawful arrest."[8] The dissent did not dispute this point. All three judges agreed that the guns were properly seized and hence admissible but differed as to whether the clothing was admissible, the majority believing the clothing to be "mere evidence" as defined in *Gouled v. United States*[9] and subsequent cases and hence inadmissible under the Fourth Amendment.[10] The dissent pointed out the lack of logic in immunizing the clothing upon being removed as "mere evidence."[11] The dissent would have allowed the clothing to be admitted on the basis that Hayden disrobed in order to avoid detection. The fact that the clothing might have been a means used to conceal the identity of the man who committed the crime caused the dissent to conclude that the majority erred in deciding that clothing may not be seized unless the person is wearing it at the time of arrest (i.e., that upon disrobing, the clothing previously worn was immediately transformed into "mere evidence"). The state of Maryland successfully petitioned for certiorari alleging that the "mere evidence rule" as professed in *Gouled* is not properly a basis for logical distinction and that the Fourth Amendment prohibits only unreasonable searches and seizures.

In *Gouled* federal officials, with a search warrant, seized papers which tended to show that the defendants had bribed a government official. The defendants were indicted on two counts; (1) conspiracy to defraud the United States, and (2) fraudulent use of the mail. The court held the papers inadmissible stating that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making a search to secure evidence to be used against him in a criminal or penal proceeding. . . ."[12] The "mere evidence rule" held that materials of purely evidential value could not be seized by federal officials, even though pursuant to a valid search or incident to a lawful arrest. According to *Gouled* the only proper objects of a search and seizure were instrumentalities, contraband, and fruits of the crime.[13]

7. *Id.* at 651. The "hot pursuit" exception to the "mere evidence rule" is justified on the ground that in order to prevent complete concealment of a crime by the destruction of evidence an officer may seize the object if the accused has immediate control over the object or if it is on his person. See United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926) and Weeks v. United States, 232 U.S. 383 (1914).

8. *Id.*

9. 255 U.S. 298 (1921).

10. Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958), United States v. Lerner, 100 F. Supp. 765 (1951), United States v. Richmond, 57 F. Supp. 903 (1944).

11. 363 F.2d at 656.

12. 255 U.S. at 309.

13. *Id.*

The *Gouled* court cited as the historical basis for the "mere evidence rule" *Boyd v. United States*.[14] In this excise tax evasion case (which was civil in form, but criminal in nature), E. A. Boyd and Son were compelled to produce, by federal statute, "any business book, invoice, or paper for inspection." The court held that such "suits for penalties and forfeitures . . . are of . . . quasi-criminal nature, . . . they are within . . . the purpose of the Fourth Amendment . . . and of that portion of the Fifth Amendment which declares . . ."[15] the right against self-incrimination. By reading the Fourth and Fifth Amendment together, the search for evidence was found unreasonable and its introduction into evidence was held to violate the defendant's right against self-incrimination, the court equating the seizure with a "forcible and compulsory extortion of a man's own testimony. . . ."[16]

In *Hayden* the petitioner claimed and the court agreed that the "mere evidence rule" has been a great source of confusion.[17] The primary sources of this confusion were the lack of a definitive rationale in *Gouled* and the problem of disinguishing evidentiary objects from those which were admissible. Two main theories have been used to substantiate the "mere evidence rule": the property theory and the privacy theory. The property theory was based on traditional concepts of title and possession. The seizure of property under this theory was based on the proposition that title had been forfeited and the right to possession terminated. Although this property theory was adequate for contraband and fruits, where title was not in the possessor, it would not apply to instrumentalities, for possession of them was usually lawful.[18] The court in *Hayden* criticized the property theory and stated: "the principal object of the Fourth Amendment is the protection of privacy rather than property. . . ."[19] Fruits and contraband may be seized when the privacy right to have the object secure is no longer a worthy matter of such protection. Although privacy is invaded when instrumentalities are seized, the courts have decided that it is better to inconvenience the individual than to allow these instrumentalities to remain in his possession.[20] The danger to the public appears to be the primary consideration of the courts in so decid-

14. 116 U.S. 616 (1885). This opinion was written by Mr. Justice Bradley with Mr. Justice Miller and the Chief Justice concurring. For an in depth study of this case see: Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593 (1966).

15. *Id.* at 634.

16. *Id.* at 630.

17. 87 S. Ct. at 1651.

18. State v. Chinn, 231 Ore. 259, 269, 273 P.2d 392, 400 (1962). See comment, *Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319, 322-23 (1953), and Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593, 622 (1966).

19. 87 S. Ct. at 1648.

20. Comment, *Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319, 327 (1953).

ing for if the means used to perpetrate the crime were allowed to remain in the possession of the accused the peril evidenced by the crime would continue.

The confusion over classifying materials as evidentiary or not is evident in *Marron v. United States*[21] and *United States v. Lefkowitz*.[22] In *Marron*, a case involving violation of the prohibition statute, utility bills were said to be instrumentalities and thus admissible. In *Lefkowitz*, also involving a prohibition violation, utility bills were held inadmissible as "mere evidence." In *Morrison v. United States*,[23] a case in which defendant was charged with a perverted sexual act, traces of seminal fluid in a handkerchief were held inadmissible; but shoes were considered an "instrumentality" of a robbery in *United States v. Guido*[24] and were thus admissible. In *Hayden* the Supreme Court attempted to eliminate this confusion by holding that: "We today reject the distinction [between instrumentalities and evidentiary objects] as based on premises no longer accepted as rules governing the application of the Fourth Amendment."[25]

Commenting on the privacy theory basis of the "mere evidence rule" the majority stated: "privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband."[26] The majority stated that the privacy guaranteed under the Fourth Amendment is still safeguarded by the fact that a magistrate's approval is required before a search warrant can be issued.[27]

Despite the abolition of the "mere evidence rule" the majority still had to consider petitioner's argument that the introduction of the petitioner's own clothing constituted a violation of the Fifth Amendment. In rejecting this argument the majority relied on *Schmerber v. California*.[28] In *Schmerber* the defendant had blood taken from him against his will for chemical analysis. The court held this did not violate the defendant's privilege against self-incrimination for the specimen was not testimonial or communicative in nature.[29] In the present case the clothing was not testimonial or communicative and did not compel the petitioner to be a witness against himself. Thus this court did not open the door all the way. While evidentiary objects are now the proper subject of a search and seizure under the Fourth Amendment the object must still meet the

21. 275 U.S. 192 (1927).
22. 285 U.S. 452 (1932).
23. 262 F.2d 449 (D.C. Cir. 1958).
24. 251 F.2d 1 (7th Cir. 1958), *cert. denied*, 356 U.S. 950 (1958).
25. 87 S. Ct. at 1647.
26. *Id.*
27. *Id.*
28. 384 U.S. 757.
29. 87 S. Ct. at 1648.

Fifth Amendment requirement of being non-testimonial and non-communicative in nature.

While the Supreme Court in *Hayden* abandoned the *Gouled* distinction (between "mere evidence" and fruits, contraband, and instrumentalities), it did provide that searches for "mere evidence" must satisfy the following conditions: (1)

> There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.[30]

and (2) the particularity requirement of the Fourth Amendment.[31]

In the concurring opinion Mr. Justice Fortas, with whom Chief Justice Warren concurs, stated that the repudiation of the "mere evidence rule" was unnecessary and exceptions to it were sufficient to encompass this case. Mr. Justice Fortas utilized the hot pursuit doctrine, stating that the "identifying clothing worn . . . and seized during 'hot pursuit' is within the spirit and intendment of the "hot pursuit" exception. . . ."[32]

Mr. Justice Douglas dissented, arguing that the seizure of evidentiary objects is unreasonable within the meaning of the Fourth Amendment.[33] In his dissent Douglas examined in detail the foundations of the Fourth Amendment and pointed out that in the case of *Entick v. Carrington*,[34] Lord Camden stated that seizure of evidence by probing searches violated the legal principle that no man is obliged to accuse himself.[35]

The dissent cited *United States v. Poller*[36] for the philosophy of the "mere evidence rule" that by limiting the ability of the government to seize the quest would be limited.[37] It was thought that by preventing searches for evidentiary objects the individual would be protected from unwarranted invasions of his privacy. This, as the majority points out, offers no greater protection of privacy since privacy is disturbed in a

30. *Id.* at 1650.

31. *Id.* at 1651. A search warrant must specifically designate what, where, from whom, and on what grounds an object is to be searched for and seized, United States v. Gannon, 201 F. Supp. 68 (1961).

32. 87 S. Ct. at 1652, 1653. See note 7 *supra*, for an explanation of the "hot pursuit doctrine."

33. *Id.* at 1653.

34. 19 Howell St. Tr. 1029 (1765).

35. 87 S. Ct. at 1654.

36. 43 F.2d 911 (2d Cir. 1930).

37. *Id.* at 914.

search for any type of object. In *Poller* Mr. Justice Hand criticized the "mere evidence rule" stating:

> If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does.[38]

It is clear that confusion in the application of the "mere evidence rule" led to much criticism of it. Now, with the literal interpretation of the Fourth Amendment in *Hayden* the confusion over instrumentalities, fruits, contraband and "mere evidence" is eliminated. Perhaps an argument made by the petitioner, but which the court did not mention was a policy reason for abandoning the "mere evidence rule."[39] This argument was that in *Miranda v. Arizona*[40] the court encouraged the police to place a heavier emphasis on scientific investigation, and if the ability to seize evidentiary objects was limited, as it was prior to this case, much scientific investigation would be frustrated. Thus this decision, logical and sound in its own right, may also be an attempt to balance the rights of the accused and the power of the police in the field of evidence and investigation.

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CONSTITUTIONAL LAW—SEARCH WARRANTS—Health and Safety Inspections—The Fourth Amendment guarantees that a person may not be convicted for refusing to consent to a health or safety inspection of his residence or place of business to be made without a search warrant.

Camara v. Municipal Court, 87 S. Ct. 1727 (1967). *See v. City of Seattle*, 87 S. Ct. 1737 (1967).

In *Camara v. Municipal Court* petitioner was convicted for violating the San Francisco Housing Code by refusing to permit an inspection of his residence on two different occasions when no search warrant had been issued.[1] Petitioner argued that the ordinance under which he was con-

38. *Id.*

39. Brief for Appellant at 38, 39, Warden, Maryland Penitentiary v. Hayden, 87 S Ct. 1642 (1967).

40. 384 U.S. 463 (1966).

1. SAN FRANCISCO, CALIF., MUNICIPAL CODE § 503; RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code. § 507 PENALTY FOR VIOLATION. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions