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Criminal Procedure - Searches and Seizures and Admissibility of Evidence - People v. Friola, 11 N.Y.2d 157, 182 N.E.2d 100 (1962)

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the call, consented to the action. Similarly, in *People v. Malotte*,[31] it was held that police officials may listen in if they obtain the consent of one of the parties to the conversation. This ruling has been stretched to cover a vast area of wiretapping with the subscriber's permission, whether or not the subscriber is a party to the conversation. While the Supreme Court of the United States decided in *Rathbun v. United States*[32] that listening in on a regular extension line is not wiretapping, the possibility of such an extension of the *Dixon* case to allow limited wiretapping in Illinois by law enforcement officials remains an intriguing subject for conjecture.

In the final analysis, it is apparent that until Congress resolves the problem by clarifying legislation, or the United States Supreme Court grants certiorari to another wiretap case which addresses the question of the relation of the *Schwart, Benanti, Pugach* and *Mapp* cases, the final denouncement of the wiretap drama will necessarily remain an enigma. Until the strongly implied condemnation of wiretapping expressed in the *Benanti* case is less qualified, or the rationale of the *Mapp* case is extended from constitutional prohibitions to federal statutes, *Dinan* points to a tenacious adherence by New York to its legislation permitting wiretapping by police officials.

[31] 46 Cal. 2d 59, 292 P. 2d 517 (1956).

[32] 355 U.S. 107 (1957).

CRIMINAL PROCEDURE–SEARCHES AND SEIZURES AND ADMISSIBILITY OF EVIDENCE

In a trial which took place prior to the United States Supreme Court's decision in *Mapp v. Ohio*,[1] defendant was convicted of having violated the State of New York's gambling laws.[2] On appeal, after the *Mapp* decision, defendant initially raised the issue that the evidence upon which he was convicted was obtained by an unlawful search and seizure. The New York Court of Appeals affirmed the conviction without looking into the question of the alleged illegality of the search and seizure. In so holding the Court found that it had no grounds upon which to review as no objection was taken at the trial to the introduction of the evidence. It was also stated by the Court that there was no mention in the record of the circumstances of the alleged illegal search and seizure. Further, the

[1] 367 U.S. 643 (1961). The *Mapp* case held that evidence obtained as a result of an illegal search and seizure must be excluded in State courts as it violates the Due Process Clause of the fourteenth amendment.

[2] N.Y. PENAL LAW § 986, 986b.

record did not reflect any inquiry by defense counsel into the circumstances of the search and seizure. The Court indicated that if there were such inquiry, or at least some effort in that direction, defendant might have preserved the question for review.[3] In fact, illegality was not even suggested, as defendant did not merely fail to object, but expressly stated that he had no objection to the admission of such evidence.[4] *People v. Friola*, 11 N.Y. 2d 157, 182 N.E. 2d 100 (1962).

It is a general rule that in order for a party to preserve a question for review he must make the objection in the trial court.[5] Failure to do so is considered a waiver of any error that might have occurred, thus barring review.[6] Under these rules, the defense would have to object to the evidence allegedly obtained by an illegal search and seizure, even though the law at the time of the trial allowed such evidence, however obtained. Therefore, the defense would be required to make an objection certain to be overruled, in order to preserve the question for review.

Confronted with a like situation also created by the *Mapp* case, the Court of Appeals of Maryland, in *Shorey v. State*,[7] affirmed the defendant's conviction. In that case defendant was charged with rape and burglary. Articles of bloodstained clothing, which were in plain view of police who were allowed to enter defendant's premises, were seized and later introduced into evidence. Defendant contended that there was error in the trial court because evidence was admitted even though it was obtained by an illegal search and seizure. However, there was no objection to the admission into evidence of the clothing claimed to have been illegally obtained. Consequently, the Court held that, even assuming the evidence was illegally obtained, there was nothing for the Court to review. In a similar case, *Banks v. State*,[8] the defendant first contended on appeal that evidence should not have been admitted as it was the result of an illegal search and seizure. The Court in affirming the defendant's conviction, held that to review that question there must have been an objection in the trial court.[9]

[3] This was a reversal of New York's position permitting illegally obtained evidence to be admitted as set forth in People v. DeFore, 242 N.Y. 13, 150 N.E. 585 (1926).

[4] This problem would not arise in Illinois because of its decision in People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923). That case held that evidence illegally obtained must be excluded.

[5] Snyder v. Commonwealth, 202 Va. 1009, 121 S.E. 2d 452 (1961); People v. Carrington, 13 Ill. 2d 602, 150 N.E. 2d 586 (1958); U.S. v. Bender, 218 F. 2d 869 (7th Cir. 1955).

[6] Peters v. State, 366 P. 2d 158 (Mont. 1961); People v. Laster, 413 Ill. 224, 108 N.E. 2d 421 (1952).

[7] 227 Md. 385, 177 A. 2d 245 (1962).

[8] 228 Md. 130, 179 A. 2d 126 (1962).

[9] *Accord*, Green v. State, 227 Md. 296, 176 A. 2d 228 (1961).

This general rule requiring an objection at trial to preserve the question for review has not been universally applied when an unanticipated procedural change such as the *Mapp* case develops. California had to decide these issues even before the *Mapp* case because of its Supreme Court decision in *People v. Cahan*.[10] There the Court excluded evidence obtained as a result of an illegal search and seizure. The courts of California have permitted review, even though there was no objection in the trial court to the admission of the evidence, if there was some inquiry into the circumstances mentioned in the record.[11]

In the California case of *People v. Kitchens*,[12] defendant was found guilty of possession of marijuana. Police officers testified that, acting on certain information, they went to a third party's apartment. There, defendant was searched without his consent and the marijuana was found. The officers had no idea who the defendant was. Defendant contended that the evdience used against him was obtained by an illegal search and seizure, but no objection was made at the trial. The Court held that the general requirement of an objection to preserve a question for appeal is not applicable to appeals based on the admission of illegally obtained evidence in cases tried before the *Cahan* decision. In response to the prosecution's contention that in the absence of evidence to the contrary it must be presumed that the search and seizure were lawful, the Court replied: "There is, however, sufficient evidence in the rcord to support the conclusion that the search and seizure at the time of defendant's arrest were unlawful."[13]

Then in *People v. Farrara*[14] the Court affirmed a conviction, holding that the necessity of objection to evidence allegedly obtained as a result of an illegal search and seizure was not applicable to pre-*Cahan* cases. There was no evidence in the record indicating illegality. The Court said, therefore, that in the absence of evidence to the contrary, it is presumed that the officers lawfully performed their duties.

When the courts of New Jersey decided these issues created by the *Mapp* case, the decisions were in accord with the California viewpoint. In *State v. Smith*[15] the Court allowed review when, at the trial, defendant

[10] 44 Cal. 2d 434, 282 P. 2d 905 (1955).

[11] People v. Kitchens, 46 Cal. 2d 260, 294 P. 2d 17 (1956); People v. Farrara, 46 Cal. 2d 265, 294 P. 2d 21 (1956); People v. Citrino, 46 Cal. 2d 284, 294 P. 2d 32 (1956); People v. Beard, 46 Cal. 2d 278, 294 P. 2d 29 (1956).

[12] 46 Cal. 2d 260, 294 P. 2d 17 (1956).

[13] *Id.* at 263, 294 P. 2d at 19.

[14] 46 Cal. 2d 265, 294 P. 2d 21 (1956).

[15] 37 N.J. 481, 181 A. 2d 761 (1962). The Court also went into a discussion as to the degree of retroactivity of the *Mapp* case.

explored the circumstances of the search and seizure without objection by the State. The defense made no objection, however, to the offer of the articles seized. The Supreme Court of New Jersey held that the rules require that an objection to the admission of evidence be made at the trial, but since the defense could not anticipate the *Mapp* case, the issue would be heard on the basis of the record made below as interpreted by the law as it existed at the time of the appeal.

Taking into its consideration the problem created by the *Mapp* decision, the New York Court of Appeals, in *Friola*, permits review whether or not objection was made to evidence introduced in the trial court. The only reservation is that some inquiry into the circumstances of the search and seizure be present in the record.

DOMESTIC RELATIONS–CHILD SUPPORT AND COLLEGE EDUCATION

Plaintiff, wife, brought a petition for additional support against her husband to send their eighteen-year-old daughter to college. The Domestic Relations division of the County Court of Philadelphia rendered an order directing the husband to pay the daughter's college tuition to the extent of a fund created by a child's educational endowment policy which had been issued to the husband, and which he intended to use to send the daughter to college. The husband appealed stating that the court abused its discretion in making the order because no evidence was admitted as to his financial ability and that the intention to send his daughter to college, coupled with an insurance policy, is not enough to legally oblige him to carry out this purpose. The Superior Court of Pennsylvania affirmed, holding that if there is an express agreement or if the circumstances warrant it, a parent may be held liable for the support of a child attending college. The court further stated that while the endowment policy is not an express agreement, its existence coupled with the father's intention to send the daughter to college are factors which warrant the decree. The court also held that the presence of the insurance policy showed the husband's ability to pay. Consequently, there was no abuse of discretion.[1] *Commonwealth v. Howell*, 198 Pa. Super, 391, 181 A. 2d 903 (1962).

[1] There is a dissent by three judges who rely on 18 P.S. § 4733 which, after making initial provisions for issuance of process and service on a defendant, provides that the court, after a hearing in a summary proceeding, may order a parent to provide a college education, when a complaint has been made and the parent is of sufficient ability to pay such sum as said court shall think reasonable and proper for the comfortable support and maintenance of the said children. The dissent states that the lower court would not allow evidence as to the inability of the husband to pay for support; thus no order should be entered.