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Constitutional Law - Statute Authorizing Search without Warrant Upheld by Reason of Equal Division of Supreme Court - Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960)

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case seems to be an affirmance of the recognition of abuses of power by unions, and an attempt to deal with a cause of these abuses in a manner not contradictory to a federal enactment: The majority felt that the New York Act did not conflict with the provisions of the N.L.R.A. The members of the Court who were in the majority in declaring the Florida statute unconstitutional in the *Hill* case of 1944 are in the minority in the *DeVeau* case. The Court seems to feel today that a curb upon union abuses by means of both state and federal enactments which are not directly in opposition is more important than an unrestricted guarantee to the employees of unions of a right to choose their own collective bargaining representative officers without any interference from state labor relations laws.

CONSTITUTIONAL LAW–STATUTE AUTHORIZING SEARCH WITHOUT WARRANT UPHELD BY REASON OF EQUAL DIVISION OF SUPREME COURT

Earl Taylor, defendant, owned and resided in a private residence in Dayton, Ohio. Three housing inspectors sought admittance to his home pursuant to a city ordinance which authorized them to enter any dwelling, at a reasonable hour and upon showing proper identification, for the purpose of inspecting the dwelling to determine if it conformed to the miminum standards of health and safety as set forth in subsequent sections.[1] The inspectors carried no credentials and were refused entry by the defendant. They returned later with identification, and the defendant inquired as to the reason for inspecting his home. The inspectors gave no reason or cause for the particular inspection, but merely told the defendant that they had a right to inspect any home. The defendant asked them if they had a search warrant and when told that they did not, he again refused entry. He was subsequently served with a warrant to appear in court for violation of the ordinance, which violation could

[1] DAYTON, OHIO, CITY ORDINANCES No. 18099, § 806.30 provides: "The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey."

result in a fine or imprisonment, or both.[2] As he was unable to provide bail, set at one thousand dollars, he was jailed. Arthur Eaton, an attorney, filed a petition for a writ of habeas corpus in the state Common Pleas Court against the chief of police. The court found the ordinance unconstitutional and discharged the defendant. This decision was reversed on appeal[3] and the Supreme Court of Ohio affirmed the reversal.[4] The Supreme Court of the United States was equally divided, and so the decision of the Supreme Court of Ohio was affirmed *ex necessitate*. *Ohio ex rel Eaton v. Price*, 364 U.S. 263 (1960).

When the defendant invoked the jurisdiction of the Supreme Court of the United States on appeal, an order, accompanied by three memorandums, was entered noting probable jurisdiction.[5] Two of these memorandums, representing the opinion of half the Court, stated that the facts in *Eaton* were similar to those of *Frank v. Maryland*[6]—a case decided four weeks earlier by the Court—and that it would be a manifestation of disrespect to allow the *Frank* case to be overruled so shortly after it was decided. The third memorandum, expressing the opinion of the four remaining Justices, pointed out the unusualness of having such statements accompany a preliminary order, for they were expressions on the merits of the case before the arguments were heard. The Court was also equally divided on the final determination. The first group of Justices above mentioned voted to affirm the decision of the lower court without issuing a written opinion. The second group voted to reverse the decision, and filed a written opinion. As a result of the equal split of the Justices, the decision of the state supreme court was, as above indicated, affirmed *ex necessitate*, and "the judgment is without force as precedent."[7]

This division of the Court indicates the acuteness of the problem before them. The problem of urban renewal—of insuring safe and sanitary housing for the people of large cities—necessitates the enactment of ordinances authorizing inspection of dwellings. However, if this type of

[2] DAYTON, OHIO, CITY ORDINANCES No. 18099, § 806.83 provides: "Any person who shall violate any provision of this ordinance shall, upon conviction, be punished by a fine of not less than twenty dollars ($20.00) nor more than two hundred dollars ($200) or by imprisonment of not less than two (2) days nor more than thirty (30) days, or both, and each day of failure to comply with any such provision shall constitute a separate violation."

[3] 105 Ohio App. 376, 152 N.E. 2d 776 (1957).

[4] 168 Ohio St. 123, 151 N.E. 2d 523 (1958).

[5] 360 U.S. 246 (1959).

[6] 359 U.S. 360 (1959).

[7] Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 264 (1960). The Court was equally divided because Mr. Justice Stewart declined to rule on the case. Justice Stewart's reason for refusing to consider *Eaton* was that his father was serving on the Supreme Court of Ohio when the case came up before that court.

ordinance provides for a search without a warrant, it is confronted by the guarantee of the fourth amendment, which insures the individual, his house, papers, and effects against unreasonable searches and seizures.[8] And that the fourth amendment applies to the states through the fourteenth, is manifested by *Wolf v. Colorado*,[9] wherein the Court in interpreting the fourth amendment, stated:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause [of the fourtheenth amendment].[10]

Thus the problem to be determined in these inspection cases is not whether the provisions of the fourth amendment are applicable to the states,[11] but whether a search by a housing inspector without a warrant violates this basic concept of ordered liberty.

Frank v. Maryland[12] is important in connection with the principal case because there was no affirming opinion written in *Eaton*, and the prior jurisdictional order indicated that *Eaton* was controlled by *Frank*. In *Frank*, the health inspectors were authorized to inspect any house "in the daytime" if they had "cause to suspect a nuisance exists" and failure to comply resulted in a forfeiture of twenty dollars.[13] There was no provision for a search warrant. The defendant claimed this ordinance violated the fourth amendment. The Court, in analyzing this amendment, held that its interpretation must be considered in connection with the fifth amendment provision that no person "shall be compelled in any criminal case to be a witness against himself. . . ."[14] The Court reasoned that the fourth amendment engulfs two protections: the right to be secure from intrusion into personal privacy, and the right to be secure from searches for, and seizures of, evidence to be used against the person in criminal prosecutions. In the opinion of the Court, a historical inquiry showed that this latter right, which is also manifested in the fifth amendment, was

[8] U.S. CONST. amend. IV, provides: "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."

[9] 338 U.S. 25 (1949).

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

[11] For a discussion of the incorporation of the fourth amendment into the fourteenth see Comment, 10 DE PAUL L. REV. 127 (1960-61).

[12] 359 U.S. 360 (1959).

[13] BALTIMORE, MD., CITY CODE art. 12, § 120 (1950).

[14] U.S. CONST. amend. V.

the basis for the creation of the fourth amendment. Further, the Court determined that the right violated by a housing inspection was the right of personal privacy, and not the right of self-protection; that this lesser right must yield to the public welfare; and that in such cases a reasonable search may be made without a warrant. While holding that due process, which guarantees these rights of personal privacy and self-protection against state action, must not be restricted within historical bounds, the Court stated that the reason that the right of personal privacy could not be invoked in this case was because "[n]o evidence for criminal prosecution is sought to be seized."[15] In effect, therefore, the Court did limit the guarantee of the fourth amendment to the right of self-protection.

Three limitations, however, were placed on these searches by the Court in *Frank:* 1) there must be probable cause before a search can be made, 2) the search must be made at a reasonable time, and 3) in case of resistance, no forcible entry may be made, although a fine may be imposed.

Prior to the *Frank* case, there were two decisions which dealt with this problem directly, *District of Columbia v. Little*[16] and *Givner v. State*.[17] In the *Little* case, there was no ordinance specifically authorizing a search, but the defendant was found guilty of "interfering with the health inspector" by denying entry. The appellate court held the search violative of the fourth amendment and reversed the conviction. The argument was raised that unreasonable searches were limited to those the purpose of which was to secure incriminating evidence. The appellate court held that the prohibition against unreasonable searches stemmed from the common-law right to privacy in one's home, and that unreasonable searches included those without a warrant for the purpose of protecting public health. The right guaranteed by the fourth amendment, according to this court, "was not related to crime or suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. . . . To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."[18] The appellate court added that the importance of public health laws did not justify the invasion of the individual's right to be secure from unreasonable searches and seizures. The Supreme Court affirmed this decision, but on non-constitutional grounds.[19] By holding that refusal of entry did not amount to an interference with duties of the health inspector, it was unnecessary for the

[15] 359 U.S. at 366.

[16] 178 F. 2d 13 (D.C. Cir. 1952), *aff'd*, 339 U.S. 1 (1950).

[17] 210 Md. 489, 124 A. 2d 764 (1956).

[18] 178 F. 2d 13, 17 (D.C. Cir. 1952).

[19] 339 U.S. 1 (1950).

Court to determine the constitutional issues and it did not consider the merits of the lower court's opinion.

The *Givner* decision upheld three Baltimore ordinances which authorized the health commissioner, building inspection engineer, and chief engineer of the fire department to make inspections.[20] The Court applied the same reasoning on which *Frank* was based, and held that such searches were reasonable, and necessary for the maintenance of public health and safety.

There is no affirming opinion in the *Eaton* case, but the Court, in its jurisdictional order merely stated that the facts therein were similar to those of *Frank*, and that therefore it was governed by that ruling. Both cases involved ordinances which provided for the inspection of homes, and both defendants denied entry to the inspectors. However, there are several differences to be noted. The Baltimore ordinance provided for a search only when there was cause to suspect the existence of a nuisance; the Dayton ordinance did not require any such reason before a search could be made. The inspectors in *Frank* acted on a complaint of rodent infestation in the neighborhood; they found the defendant's home in an extreme state of decay and discovered, in the rear, approximately a half ton of rodent feces mixed with debris. In *Eaton* no complaint had been filed, the inspectors found the house in good condition, and they were unable to give a reason for the specific search. The defendant in *Frank* could only be fined; in *Eaton* the defendant could be fined or imprisoned, or both. With these differences in mind, the next step is to apply the *Frank* ruling to *Eaton*. The former held valid an ordinance authorizing a search by a health inspector without a warrant if there were reasonable grounds for believing the house was below minimum standards of health and safety, if the search was conducted at a reasonable hour, and if no forcible entry was allowed in case of resistance. The ordinance in *Eaton* did not provide for any grounds or reason for such a search, nor did the inspectors purport to have any specific reason for the search. Since the *Eaton* decision was affirmed, apparently *probable cause*, the first safeguarding factor, is no longer necessary. The attempted search was during the daytime, so that the second limitation of the *Frank* case was present. The last requirement, absence of a forced entry, was also fulfilled in the *Eaton* ordinance. It should be noted, however, that by the *Eaton* holding a violation may be punished not only by a fine, but also by imprisonment. Thus this last requirement has been extended to allow imprisonment of a person for invoking the right of privacy in such cases.

There remains, however, another factor which must be considered. *Frank* held that a search by a health inspector was not to secure in-

[20] BALTIMORE, MD., CITY CODE art. 12, § 120; art. 5, § 120; art. 9, § 26c (1950).

criminating evidence and that the right to self-protection, as a part of the fourth amendment, was not violated. Assuming, for example, that a home owner allowed the inspection, and substandard conditions were found to exist, the owner would be given a certain amount of time to correct the condition. If he failed to do so, civil proceedings would be instituted against him for the purpose of imposing a fine. The question would then arise as to whether the search did, in effect, tend to incriminate him. The fourth amendment guarantee against unreasonable searches and seizures, the *Frank* case holds, must be considered in light of the fifth amendment provision that no man "shall be compelled in any criminal case to be a witness against himself. . . ."[21] It then becomes necessary to determine what is meant by *a criminal case*. In construing this clause the Court, in *Counselman v. Hitchcock*,[22] stated:

> It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him *or subject him to fines, penalties or forfeitures*.[23]

In *Boyd v. United States*,[24] a civil proceeding for fraud under the revenue laws, the Court said:

> We are clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses commited by him, *though they may be civil in form are in their nature criminal*.[25]

The Court, in these instances, holds that this privilege against self-incrimination can be raised, not only in a civil proceeding which could give rise to a subsequent criminal proceeding, but also in a civil proceeding which, in itself, or in a subsequent civil proceeding could give rise to fines, penalties or forfeitures. Therefore, if a witness is protected under the fifth amendment from disclosures which would lead to a civil proceeding against him for fines, penalties, or forfeitures, and not necessarily a prosecution for a crime, then it would seem to logically follow that this same person should be protected under the fourth amendment from any search which would give rise to a proceeding against him for fines, penalties, or forfeitures. In the latter case, the person is not merely invoking the right of privacy, but also the right of self-protection, which the Court holds is the primary right under the fourth amendment.

At first glance, building ordinances, as those in *Frank* and *Eaton*, seem

[21] U.S. CONST. amend. V.

[22] 142 U.S. 547 (1892). (Emphasis added.) [23] *Id.* at 563–64.

[24] 116 U.S. 616 (1886). (Emphasis added.) *Cf.* Lees v. United States, 150 U.S. 476 (1893).

[25] *Id.* at 633–34.

to provide only for a search, with no seizure of evidence. However, the testimony of the housing or health inspector as to the condition of the house, together with any notes written down or photographs taken at the time of the inspection, are used as evidence in the subsequent proceeding to impose a fine if the conditions are not corrected. It would seem that in effect, therefore, there is a seizure of evidence.

State courts are in conflict as to the exact nature of the subsequent proceeding which has as its purpose the imposition of a fine for violation of a municipal ordinance. While these suits are civil in form, it has been held that they are criminal in nature if the ordinance covers a common law or statutory crime.[26] In *City of Chicago v. Lord*,[27] the Illinois Appellate Court held that while a suit by a city for the violation of a municipal ordinance is a civil suit, it is, like other proceedings involving the imposition of penalties and forfeitures for violation of public law, criminal in nature. In the *Lord* case the court applied the state exclusionary rule to evidence obtained by an unlawful search and seizure, even though the case was a civil proceeding for violation of a municipal ordinance.[28]

The result of the *Eaton* decision—that a search warrant is unnecessary for a housing inspection—would seem to have left the home owner without an adequate safeguard against an abuse of his right of privacy. Even if probable cause is necessary before such a search can be made, there remains the problem of who is to determine if the cause is adequate. If a court does not sanction the search, then the city building department or the inspector, individually, will determine the adequacy of the cause. This is an extremely important determination, and if left in the hands of the city law enforcement agencies, it could lead to an arbitrary abuse of the rights of the individual. There is some indication of this in the principal case, for in *Eaton*, the inspectors on their first visit, failed to carry with them the credentials required by the ordinance. The prerequisites for such a search, as pointed out by the dissenting view, need not be as stringent as those necessary for a search for evidence of a crime. It is suggested that the solution to the problem is an ordinance similar to the one now in effect in Denver, where a court order is necessary when there is resistance to the search.[29]

[26] *Ex parte* Simmons, 40 Okla. Crim. Rep. 662, 112 Pac. 951 (1911).

[27] 3 Ill. App. 2d 410 (1954); *cf.* Salt Lake City v. Robinson, 39 Utah 260, 116 Pac. 442 (1911); City of Russellville v. Edwards, 80 Ark. 314, 97 S.W. 57 (1906); Barnett v. City of Atlanta, 109 Ga. 166, 34 S. E. 322 (1899).

[28] The court, in interpreting the fourth amendment and Illinois Constitution § 6, art. II, which are substantially the same, stated: "This protection against an unreasonable search is based on the invasion of the privacy of the individual—his home, office and effects—rather than on the self-incriminatory effect of the evidence secured." *Id.* at 416.

[29] DENVER, COLO., REVISED MUNICIPAL CODE § 631.2 (1957).