SMU | Dedman School of Law

SMU Law Review

Volume 25 | Issue 5 Article 9

January 1971

The Flagrantly Illegal Arrest - Up the Poisonous Tree and Part Wade

Bob Harrison

conspiracy aspects of both statutes, cases will frequently present a violation of both. If Congress really intends a four-year statute of limitation, single damages, and only prima facie use of previously established evidence, then the False Claims Act will have to be modified as it applies to conspiracy. After *Beatrice Foods* the Government, as an antitrust damage plaintiff, would be foolish not to include a False Claims count. In fact, with the exception of very few and limited circumstances,[90] section 4A of the Clayton Act might well become a dead letter.

M. Russell Kruse, Jr.

The Flagrantly Illegal Arrest — Up The Poisonous Tree and Past *Wade*

Four FBI agents obtained a warrant for the arrest of Reggie Oliver, executed the warrant at Oliver's apartment, and then attempted to leave the neighborhood. They were immediately confronted by a crowd of forty to fifty people who had been summoned by Oliver's sister-in-law. The crowd, shouting epithets and threatening to kill the agents unless they released Oliver, caused the escape of the prisoner and injury to the officers. The next morning other agents were told to return to the neighborhood to arrest Oliver, his sister-in-law, and any others who participated in the assault. The arrest of the other participants was to be based upon their failure to have Selective Service cards in their possession. A photograph of Oliver was distributed to the agents, but members of the mob were vaguely described as "young and black." The agents returned to the neighborhood and arrested the defendants for failure to have Selective Service cards. The defendants were taken to headquarters where they were placed before the assaulted agents for identification without the presence of counsel. The assaulted agents' subsequent in-court identification of the defendants was admitted over objection, and a conviction followed. *Held, reversed with instructions to dismiss the indictment*: In-court testimony obtained as a result of a flagrantly illegal arrest executed "for the very purpose of exhibiting a person before the victim and with a view toward having any resulting identification duplicated at trial" is barred by the exclusionary rule. *United States v. Edmons*, 432 F.2d 577 (2d Cir. 1970).

I. The Poisonous Tree and its Historical Growth

The "fruit of the poisonous tree"[1] doctrine, when coupled with the "exclusionary rule,"[2] excludes from use in a criminal prosecution that evidence which

[90] *See* text accompanying notes 70-73 *supra.*

[1] The phrase was coined by Mr. Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341 (1939).

[2] The "exclusionary rule" excludes illegally obtained evidence from use at trial. The "fruit of the poisonous tree doctrine," on the other hand, traces the use of illegally obtained information from the primary illegality to the introduction of evidence which was gathered

is obtained as a result of the exploitation of *prior* illegal conduct by law enforcement officials. The doctrine's roots can be traced to the United States Supreme Court's holding in *Weeks v. United States*:[3] evidence seized during an illegal search is to be excluded at trial. *Weeks*, which became the touchstone for later cases in which the "exclusionary rule" was applied, set the stage for the Court's holding in *Silverthorne Lumber Co. v. United States*.[4] In *Silverthorne* federal agents illegally seized documents, photographed the desired information, returned the originals, and then attempted to compel production of the originals at trial. The Court refused to admit either the photographs or the originals, even though only the photographs had been illegally obtained. Mr. Justice Holmes, speaking for the Court, advanced the basis of the "poisonous tree doctrine," stressing that "the essence of a provision forbidding the acquisition of evidence in a certain way [is not merely that] evidence so acquired shall not be used before the Court but that it shall not be used at all."[5]

Nardone v. United States[6] prompted a reconsideration of whether illegally obtained information could be used to gather other evidence. The Court refused to allow the prosecution to introduce evidence discovered as a result of information gained by illegal wiretapping.[7] The rationale for the decision was that the exclusion of only the exact words overheard, and the permission of derivative use of the intercepted telephone messages, would largely stultify the policy which compelled reversal of a conviction in the same case two years earlier.[8]

Both *Silverthorne* and *Nardone* adopted the "independent source rule" as an exception to the "poisonous tree doctrine." As stated in *Nardone*, the exception is that facts "improperly obtained do not become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it simply because it is used derivatively."[9] *Nardone*, in addition, enunciated a second exception to the doctrine. "Attenuation of the taint" may break the casual connection between the illegal activity and the Government's proof.[10] Thus, when the primary illegality is sufficiently removed from the evidence submitted, that evidence is admissible. The application of this ex-

---

as a result of exploitation of that primary illegality. The latter doctrine then employs the exclusionary rule to bar such evidence from use at trial.

[3] 232 U.S. 383 (1914).

[4] 251 U.S. 385 (1920).

[5] *Id.* at 392.

[6] 308 U.S. 338 (1939).

[7] *Id.* at 341. For a more detailed treatment of the use of the exclusionary rule in wiretapping cases, see United States v. Coplan, 185 F.2d 629 (2d Cir. 1950). *See also* Pitler, *Eavesdropping and Wiretapping—The Aftermath of Katz and Kaiser: A Comment*, 34 BROOKLYN L. REV. 223 (1968).

[8] 308 U.S. at 40. The case reversed two years earlier involved a conviction based on a conversation which was overheard in violation of the Federal Communications Act, 47 U.S.C. § 605 (1970). *See* Nardone v. United States, 302 U.S. 379 (1937).

[9] 308 U.S. at 341, quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The "independent source rule" has also been referred to as the "facts-evidence theory." One writer has suggested a similarity between this theory and the proximate cause concept in the law of torts. "No taint attaches unless such evidence is the natural, probable, and foreseeable consequence of the wiretapping." Bernstein, *The Fruit of the Poisonous Tree: A Fresh Appraisal of the Civil Liberties Involved in Wiretapping and Its Derivative Use*, 37 ILL. L. REV. 99, 106 (1942).

[10] 308 U.S. at 341.

ception calls for a case-by-case approach, relying on the "learning, good sense, fairness and courage of federal trial judges."[11]

Wong Sun v. United States[12] is the most comprehensive case concerning the "fruit of the poisonous tree." *A*, who had been illegally arrested, informed federal agents that *B* possessed narcotics. When *B* was arrested by the agents he surrendered heroin and made statements implicating *C*. *C*, arraigned and then released on his own recognizance, voluntarily returned and confessed. The federal agents admitted that no drugs would have been found without *A's* assistance.

The Court found the narcotics to be "fruit of the poisonous tree" because their discovery stemmed from *A*'s illegal arrest. Mr. Justice Brennan, for the Court, then set out the "independent source" and "attenuation of the taint" exceptions. The controlling question, however, was whether the evidence had been obtained "by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[13] The Court excluded the narcotics from the evidence against *A*. Since the discovery of the narcotics was directly traceable to *A*'s illegal arrest, exclusion was also warranted in *B*'s case. However, the Court held the narcotics to be admissible against *C* because his statements were made subsequent to the seizure and did not contribute to discovery of the narcotics. *C*'s confession was also held to be admissible. Because *C*, after being arrested and released on his own recognizance, returned voluntarily to confess, the connection between his illegal arrest and subsequent voluntary confession had "become so attenuated as to dissipate the taint."[14]

"Fruit of the poisonous tree" evolved from the "exclusionary rule" in *Weeks* into a somewhat independent doctrine, as demonstrated by *Wong Sun*. Nevertheless, the doctrine still depends upon the operation of the exclusionary rule. The two concepts work together to bar from use at trial any evidence obtained through exploitation of prior illegal police conduct. Evolving with the doctrine, the independent-source rule and the attenuation-of-the-taint rule have become recognized exceptions.[15]

---

[11] *Id.* at 342. This procedure has been described as "vague" and as "leading to uncertainty." However, it seems to be justified, "for in placing control in the hands of the trial judge the admissibility of the evidence will be decided upon by the one best able to understand what the justice of the particular situation requires." Note, *Further Restrictions On the Admissibility of Illegally-Obtained Evidence*, 34 ILL. L. REV. 758, 759 (1940).

Costello v. United States, 365 U.S. 265 (1961), attempted to clarify the "attenuation of the taint" exception. The facts in *Costello* involved an illegal wiretap and its connection with defendant's in-court admission. The Court held that defendant's admissions were made on the presumption that the authorities had been accumulating information over a period of time and were not compelled by the illegal wiretap. *Costello* noted an independent source of information and a connection between the illegal wiretap and the admission of guilt so "attenuated" as to remove the taint from the illegal wiretap.

[12] 371 U.S. 471 (1963).

[13] *Id.* at 488.

[14] *Id.* at 491, quoting *Nardone*, 308 U.S. at 341.

[15] The "inevitable discovery" rule has been cited as a third exception. To establish this exception the prosecution must "satisfy the court, as a fact, that the preferred evidence *would* have been acquired through lawful sources of informaion even if the illegal act had never taken place." Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L. 307, 317 (1964).

II. UNITED STATES V. WADE—A SPECIES OF POISONOUS TREE

In *United States v. Wade*[16] the defendant was indicted for the robbery of a federally insured bank. Subsequent to the indictment and without notice to his attorney, the defendant was placed in a police line-up before two witnesses. The Court held such a line-up to be violative of the defendant's sixth amendment right to counsel, the rationale being that a line-up was a critical stage of prosecution, one in which denial of counsel would prejudice the accused's right to a fair trial.[17] The Court further held that enforcement of the requirement for presence of counsel necessitated the application of the exclusionary rule. When the right to counsel is violated, resultant line-up and in-court identifications are presumptively excluded as evidence at trial. The Court concluded that the courtroom identification would be admissible in such cases only if the state could show that the identification was not obtained by the primary illegality, but had an independent source. Thus, *Wade* employed *Wong Sun* reasoning, the illegal line-up in *Wade* representing the counterpart of the primary illegality which gives rise to an application of the "fruit of the poisonous tree" doctrine. The in-court identification was the "fruit" of the tainted pretrial identification procedure. In either case, if the prosecution can demonstrate that the testimony to be excluded has an origin independent of the illegal conduct, the exclusionary rule does not operate.

III. UNITED STATES V. EDMONS

In *United States v. Edmons*[18] Judge Friendly's majority opinion recognized the district court's finding that the arrests of the defendants were illegal, a finding which was uncontested by the Government. The arrests were illegal because they were pretextual; *i.e.*, the actual reason for the arrests was to make the defendants available for identification by the injured agents.[19] Hence, the arrests for failure to have Selective Service cards in their possession were made in pursuance of a scheme.[20]

Judge Friendly then analyzed the position taken by the Government in the lower court. The Government relied on an exception to the rule pertaining to illegal line-ups announced in *Wade*, which allows in-court identification when based on an "independent source." The Government attempted to establish the independent source by proving that "before the illegal line-up there was already such a definite image in the witness' mind that he [was] able to rely on it at trial without much, if any help" from the line-up.[21] The Gov-

[16] 388 U.S. 218 (1967); *see* Note, *Lawyers and Line-ups*, 77 YALE L.J. 390 (1967). *See also* Note, *Right to Counsel at Pretrial Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution*, 29 U. PITT. L. REV. 65 (1967).

[17] 388 U.S. at 237.

[18] 432 F.2d 577 (2d Cir. 1970).

[19] *Id.* at 583.

[20] "Moreover, the F.B.I.'s failure to take the five men promptly before a Commissioner and the absence of any proceeding against Pacheco confirm that appellant's failure to have their draft cards immediately available was not the true reason for the arrests and that these were motivated rather by the hope that the agents who had been attacked the preceding evening might be able to identify some or all of the young blacks brought to F.B.I. headquarters." *Id.* at 582.

[21] *Id.* Like the "attenuation of the taint" exception, this standard suffers from vagueness

ernment stressed the weight an appelate court gives in such cases "to the determination of the judge who saw and heard the witness."[22]

The defendants' argument for reversal of the district court decision did not depend upon *Wade*.[23] The defendants relied upon *Wong Sun*. *Wong Sun*, as examined earlier, viewed the critical issue as "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by *exploitation* of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[24] The defendants contended that since the exploitation of the illegal arrest was a prerequisite to the in-court identification, the identification should have been considered "fruit of the poisonous tree."

The court in *Edmons* ultimately followed *Wong Sun*, never really encountering the *Wade* problem. An analogy may clarify the court's position. Consider the illegal arrest as creating a Pandora's Box, full of tainted evidence and not to be opened. Because the box is not opened, the underlying *Wade* problem concerning the illegal line-up and its connection to the in-court testimony is never examined. The keys that will open the box, by severing the connection between the tainted evidence and the illegal arrest, are the independent-source and attenuation-of-the-taint exceptions. Until the link between the illegal arrest and the in-court identification is broken, no inquiry will be made into the relationship between the illegal line-up and the testimony adduced at trial. For this reason, the court did not reach the question of whether the illegal line-up warranted reversal.

IV. Fruits and Flagrancy

The Independent Source and Its Application. In *Edmons* the Government actually established a source of identification independent of the illegal line-up. This independent source was the image of the defendants which had become fixed in the minds of the injured agents at the time of Oliver's arrest.[25] The Government asserted that the agents' recollections were independent of any identification occurring between the time of the agents' initial confrontation with their attackers and the final identification at trial. This independent source is a well-founded exception to *Wade* and critical to the issue of whether illegal line-ups require exclusion of tainted in-court testimony.[26] However,

---

and may rest solely in the discretion of the trial judge. Nevertheless, it has been all but established as an inflexible rule. *See, e.g.*, United States *ex rel.* Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970).

[22] 432 F.2d at 582. The Government also relied upon a statute which might be construed to supersede the holding in *Wade*. This statute, 18 U.S.C. § 3502 (1970), asserts that "the testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in any trial court ordained and established under Article III of the Constitution of the United States." This statute, Omnibus Crime Control and Safe Streets Act of 1968, § 701(a), 18 U.S.C. § 3502 (1970), could have far reaching implications indeed! *See, e.g.*, United States v. Zeiler, 296 F. Supp. 224 (W.D. Pa. 1969); United States v. Scarpellino, 296 F. Supp. 269 (D. Minn. 1969).

[23] 432 F.2d at 586. The court did not consider the question of whether 18 U.S.C. § 3502 (1970) overruled *Wade*.

[24] 371 U.S. at 488 (emphasis added).

[25] *See* note 21 *supra*, and accompanying text.

[26] 432 F.2d at 582.

this independent source was not effective in *Edmons* because the primary illegality was the illegal arrest, not the illegal line-up. Thus, in *Edmons*, as in *Wong Sun*, the critical issue was whether the illegal arrest required exclusion of certain evidence. In *Edmons*, however, the resolution of this question went to the availability to the prosecutor of certain testimony at trial.[27] The point to be emphasized is that the court refused to apply the Government's exception, recognizing that one independent source will not remedy both the *Wade* and *Wong Sun* problems, the application of each being based upon two distinct primary illegalities. The court recognized no other independent source possibility in tracing the route of the evidence from the illegal arrest to the introduction of the testimony at trial.[28] Such an independent source would have best been asserted by showing identification traceable to some other origin. This would have occurred, for example, had one of the persons in the neighborhood at the time of the attack come forward to make an in-court identification. Such an identification would have been independent of the illegal actions of the federal agents.[29]

The Flagrant Arrest as More Than Exploitation. The court in *Edmons* further brought the case within the *Wong Sun* guidelines by establishing the *flagrant* illegality of the arrest. *Wong Sun* recognized the exploitation of an arrest as a "reminder that an exclusionary rule is a deterrent device."[30] The court, however, pointed out that *Edmons* differed "significantly from most [cases] that have dealt with the use of 'fruits' of [an] illegal arrest. The arrests here violated the Fourth Amendment not because law enforcement officers crossed the line, often a shadowy one, that seperates probable cause from its lack, but because they deliberately seized the appellants on a mere pretext for the purpose of displaying them to the agents who had been present at the scene of of the crime."[31] The court emphasized the flagrancy of the pretextual arrest by asserting that federal convictions are not easily rendered when such conditions

[27] One interpretation of this "availability of testimony" concept suggests the application of a "but-for" rule, a rule expressly rejected by *Wong Sun*. *See* note 38 *infra*. A cursory reading of *Edmons* implies that it holds that illegal arrests warrant exclusion of identification at trial. Exclusion of in-court testimony is relatively new and controversial in that it differs from the usual exclusion of tangible evidence such as documents and drug paraphernalia. However, several cases have barred such testimony from trial. *See, e.g.*, Smith v. United States, 344 F.2d 545 (D.C. Cir. 1965); United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964). The significance of the in-court testimony in *Edmons* was that it represented the tainted fruit of the illegal arrest and was traced through the "fruit of the poisonous tree" doctrine from that primary illegality to introduction into evidence at trial. Thus, while *Edmons* does not grant immunity from prosecution whenever an illegal arrest is established, it does hold that when that arrest is *exploited*, the "fruit of the poisonous tree" doctrine may be invoked.

[28] This may explain why the indictment was dismissed. Most cases call for reversal and remand to the lower court for inquiry into the existence of a possible independent source exception. In *Edmons* the court recognized no other exceptions, and the in-court testimony of the agents was the only evidence upon which the defendants might be convicted. Therefore, the indictment was ordered dismissed.

[29] If this had occurred, the Government might have employed the independent source *or* the inevitable discovery exception. *See* note 15 *supra*. The two doctrines overlap somewhat. However, the independent source exception would probably be more effective because it is the more widely recognized.

[30] Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A.L. REV. 32, 38 (1967).

[31] 432 F.2d at 583.

are present. The court further admitted that if the in-court identifications had not been excluded by an application of the fourth amendment, the evidence might have been barred in the exercise of the court's "supervisory power."[32] Hence, had an independent source been established, its importance would have been somewhat undermined, assuming that the case turned primarily on the flagrant arrest. The court defended this point of view by submitting that "a ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence [and] courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens."[33] The court admitted that "the Government's conduct here may not have been criminal [but] it departed so far from constitutional standards that a federal court could not simply look the other way."[34]

The Problem of the "But-For" Rule. Problems arising from the court's decision stem mainly from the organization of the opinion. Judge Friendly interjected *Wade* and *Wong Sun* reasoning throughout the opinion. Had he isolated the *Wade* problem, analyzed it, rejected it, and proceeded to *Wong Sun* and the flagrant arrest, his resolution of the case would be less confusing and more resistant to criticism.[35]

The most pronounced criticism of the court's decision was asserted by the dissent.[36] It questioned whether a "but-for" rule was the basis for exclusion of the testimony. The court cited *Wong Sun* as expressly rejecting this possibility and submitted that "we need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police."[37] However, the "but-for" rule cannot rightfully be cast aside by a mere citation to *Wong Sun*, since *Wong Sun* itself has been criticized as applying such a rule.[38] *Edmons* should not be read as a case barring in-court testimony simply as a result of an illegal arrest.[39] It should rather be read as a case barring in-court testimony when such evidence is traced by the logical sequence prescribed in the "fruit" doctrine to the discovery of an exploited primary illegality as its source. It was this exploitation, heightened by

[32] *Id.* at 585.

[33] *Id.*, quoting Terry v. Ohio, 392 U.S. 1, 13 (1968).

[34] 432 F.2d at 585.

[35] This lack of organization probably led to the dissent's argument for an application of the independent source exception, one which culminated in the broad assertion that the court was advocating immunity from prosecution. The dissent, quite understandably, regarded any independent source as potent enough to purge the taint of the illegal conduct. The dissent should have distinguished the independent source as applied to the line-up problem from that of the independent source as applied to the illegal arrest problem. However, the organization of the majority opinion rendered this distinction almost impossible to ascertain upon anything less than a close reading and detailed study of the case.

[36] *See* note 27 *supra*, for another criticism concerning independent source problems and the question of immunity.

[37] 371 U.S. at 487-88 (emphasis added).

[38] One author, for example, accepts the suggestion of a "but-for" inference in *Wong Sun*, interpreting the court as asserting "that there are two steps in the task of analyzing a causal connection:" (1) a logical and descriptive step to which a but-for test is appropriate; and (2) an ascriptive step that relies on the continuous-motion manner of the evidence's journey to its presentation in the courtroom. The author concludes by stressing the weight given to the "exploitation." Ruffin, *supra* note 30, at 38.

[39] *See* note 27 *supra.*