CRIMINAL LAW: Voluntary surrender of evidence to a sheriff who has no search warrant is admissible in evidence.

January 26, 1940

FILED
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Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 21, 1939, which reads as follows:

"Herein is a motion to suppress certain evidence in a criminal trial to be heard and the defendant in the case is charged with a major crime.

"The facts are as follows:

"A man X disappeared in 1936. He was hunted far and wide and never has been seen alive. His partner in farming a farm was under suspicion, but the body had not been found then, and there was nothing against Y, the defendant and farm partner. At the time X disappeared he had on him a certain watch that can be definitely described by his relatives. About 3 years after his disappearance this same watch is supposed to have turned up in the hand of Y who was under suspicion all the time.

"In July, 1939, before the county grand jury Y was subpoenaed as a witness to testify of what he knew about the disappearance of his partner X. In the course of the examination he was asked about his watches, and he related the one he usually carried was broke and in the jewelry shop at the present time; and which was a fact, and he was asked about the other watch that he was reported carrying. He stated that he had such a watch but that particular watch was at his home. He told in detail where he obtained the watch and how long ago. He stated before the grand jury that he would produce the watch under request.

"Either the foreman of the grand jury or the prosecuting attorney asked the sheriff if he could go out to the farm home of Y and get the watch that was supposed to have been the property of Y. X was still before the grand jury and telling all he knew and answering any questions asked. His boy, of 17 years who had previously testified before the grand jury was sitting in the office of the sheriff awaiting for his father Mr. Y. The sheriff asked him if he knew where this other watch was that his father owned, and which was at home. The son said yes, he knew the watch and had carried it to school, and would go out to his home and get the watch for the sheriff to see. Permission was never asked of Y in the meantime for possession to get the watch. In fact Y did not know that the watch was being sent after.

"The sheriff took the son out to the farm home. The sheriff stopped in the drive way and waited by his car for the boy to go in the home and return with the watch in question. The son soon came back with the watch and his mother, wife of the D., and in presence of the sheriff and the wife, the son handed the watch over to the sheriff. The sheriff and the son returned back to the county seat. The sheriff asked a watch repairman if he could tell whether he had had this, the watch in his shop. The watch repairman looked on the inside of the watch case and found his mark, and a number that enabled him to turn to a certain page. On that page was a record of the watch, showing the exact number of the case and an exact number of the movement, with the name of X, the date, which was long prior to the time when X disappeared. The relatives of X examined the watch and did swear before the grand jury that the watch was the same kind and was the same watch that X owned and carried at the time of his disappearance.

"After Y had testified before the grand jury he went home. Later he was taken into custody, some time later, by the sheriff and the state highway patrol and questioned about this watch that belonged to X and which was in Y's possession.

"The grand jury did not indict Y.

"Later a skeleton was found in Morgan County, Mo, which has been identified by substantial proof as being the remains of X. All the case against Y

for the homicide of X, is circumstantial evidence, just like this watch evidence. I, as prosecuting attorney, filed a complaint against Y charging Y with homicide. Y has had a preliminary examination, and has been bound over to the circuit court.

"The D-Y is relying on State vs. Wright 336 Mo. 135-77 SW (2) 459, as the authority suppressing the evidence appertaining to the watch.

"I want an opinion as to whether this obtention of this watch was an illegal search and seizure under Article 2, and section 11, of the Mo. Constitution? Why would not this be a case of consent as set out in State vs. Tull 62 SW (2) 389-l.c. 392. D. was not in custody, under arrest, at the time the watch was obtained. D. was before the grand jury on a subpoena and was voluntarily testifying of all that he knew about the disappearance of X. In 77 SW(2) 459, the D. was in jail, when the evidence was procured out of the home of the D. by an illegal search warrant."

Section 11, Article 2, Constitution of the State of Missouri, reads as follows:

"That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place

> to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

Amendment 4, of the Constitution of the United States, reads as follows:

> "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."

The two principal sections of the state law, in regard to search warrants are as follows: Section 3769 R. S. Missouri, 1929, which reads as follows:

> "Upon complaint being made, an oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place, if such magistrate shall be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property."

Also, Section 3783 R. S. Missouri, 1929, many articles of property are therein set out which are subject to recovery on a search and seizure warrant, but because of the length of the section we are unable to set it out in detail. According to your request you state that the defendant was testifying before a grand jury in response to a subpoena issued from that body, but in the motion to suppress evidence which is attached to your request you state that the defendant was testifying before a grand jury in response to a subpoena issued from that body, but the motion to suppress evidence which is attached to your request states that the defendant was confined and imprisoned without a warrant.

I am assuming that the statement of facts as set out in your request is a true state of facts and this opinion is being based upon your request and not upon the motion to suppress evidence.

Your request does not state that the sheriff used any force to cause the seventeen-year-old boy to go with him to get the watch from the home of the defendant. It also states that the defendant stated that he would produce the watch under request.

Under the above state of facts the case of State v. Wright, 77 S. W. 2d 459, would not be applicable, for the reason that the defendant, while testifying before the grand jury was not under arrest, but was merely before the body in response to the subpoena. In that case the court, at page 462, said:

> "* * Our statutes on searches and seizures separately define the types or character of property for which search warrants may be issued and the conditions under which this extraordinary power of the state may be exercised,

> all of which must be particularized in a written, verified application. The specific requirements and the restraints of our statutes and of our Constitution are by way of protection of the rights gained by the American Colonies in the struggle against general warrants and writs of assistance. It is needless to say that no statute sanctions the issuance of a warrant to search the home of one charged with murder in order to secure evidence against the accused while he is in jail. In this case the application for a warrant to search appellant's house was made under authority of section 3769, p. 3306, Mo. St. Ann., which empowers a magistrate to issue a search warrant for any personal property that has been stolen or embezzled. This statute is declaratory of the earliest common-law use of a search warrant. 56 C. J. 1155; Buckley v. Beaulieu, 104 Me. 56, 71 A. 70, 22 L. R. A. (N.S.) 819."

The holding in that case was that the state was not allowed to search a home under a valid search warrant by way of subterfuge to obtain evidence in a murder case while the defendant was confined in jail. That is not the facts in the case as set out in your request, and the case of State v. Wright is not applicable. The court also in the case of State v. Wright, supra, said:

> "The cases make it clear that there may be a lawful search and seizure without a warrant, and there may be an unlawful search and seizure by officers armed with a warrant. The facts in each instance determine the legality of the proceeding. * * "

Under this holding all search warrants are subject to interpretation as to their legality under the facts in each instance.

In the case of State v. Tull, 62 S. W. (2d) 389, l.c. 392, the court said:

> "Appellant assigns as error the admission of the testimony of the sheriff and several officers who were with him showing the finding of the cultivator and its identification, on the ground that the sheriff was not armed with a search warrant, wherefore the search of the premises where the cultivator was found was illegal and any evidence thus obtained incompetent. The cultivator was found in a lot or field behind a barn on land which belonged to defendant, but at the time, according to his own testimony, was in charge of his tenant. It was not necessary to make a search except, perhaps, to go upon the premises far enough to see behind the barn. When the sheriff arrived he met defendant there and saw the car, which was in sight and had upon it the license number of the one he sought, and which defendant said was his. The sheriff then told him a cultivator had been stolen, and asked if it would be all right to search the premises without a warrant. Defendant at first demurred, and the sheriff, without then attempting to search, sent two officers to procure a search warrant. While they were gone, defendant voluntarily told the sheriff that the men who had gone for the search warrant 'had it in for him,' but if he (the sheriff) would 'go to town with him,' he might search without a warrant. The

> sheriff said he would, whereupon the defendant led the sheriff and the other officers to the cultivator and showed it to them. * * * * * ."

Under the holding in this case the court held that where a defendant voluntarily submitted to a search without a warrant, any competent evidence discovered under the search warrant would be admissible against him. Under the facts stated in your request the court hearing the motion to suppress the evidence would undoubtedly hold that since the defendant, while testifying before the grand jury, stated that he would produce the watch upon request, and the fact that his boy, without duress, went with the sheriff and entered the house and then brought the watch out to the sheriff, the evidence would be admissible upon the ground that it was voluntary produced as set out under the holding of State v. Tull, supra.

If the court should hold, under the state of facts, that the seventeen-year-old boy acted without authority and entered the home of his father and then gave the watch to the sheriff, who was sitting in a car outside of the house, he could further hold that this unlawful seizure by the seventeen-year-old son was not a violation of Article 2, Section 11, of the Constitution of the State of Missouri, or Amendment IV of the United States' Constitution. This reasoning was upheld in the case of State v. Pomeroy,130 Mo. 489, l.c. 499, where the court said:

> "In State v. Flynn, supra, Bell, J., speaking as the organ of the court, said:'It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or

where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owners. If a party should have the power to keep out of sight, or out of reach, persons who can give evidence of facts he desires to suppress, and he attempts to do that, but is defeated by force or cunning, the testimony given by such witnesses is not his testimony, nor evidence which he has been compelled to furnish against himself. It is their own. It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his.'

"These authorities are conclusive on the question; there was no error, therefore, in admitting the evidence referred to.

"Furthermore, section 11, of our bill of rights, was intended as a restriction on the powers of government, and not designed as a restraint on the unauthorized acts of individuals. * * * "

Also, in the case of State v. Lock, 259 S. W. 116, l.c. 120, where the court said:

"It is stated in State v. Pomeroy, 130 Mo. 498, 32 S. W. 1002, that section 11, supra, is intended as a restriction on the powers of the government, and not a restraint on the unauthorized act of an individual. In Burdeau v. McDowell, 256 U. S. 465 loc. cit. 475, 41 Sup. Ct. 574, 576 (65 L. Ed. 1048, 13 A. L. R. 1159), the same conclusion is reached; the court stating:

"'The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases (Boyd v. U. S., 116 U. S. 616; Adams v. N. Y., 192 U. S. 585; Weeks v. U. S., 232 U. S. 383; Johnson v. U. S., 228 U. S. 457; Perlman v. U. S., 247 U. S. 7; Silverthorne Lumber Co. v. U. S., 251 U. S. 385; Gouled v. U. S., 255 U. S. 298), its protection applies to governmental action. Its origin and history clearly show that it was intended as restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of the unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.'"

Also, in the case of State v. Lee, 11 S. W. (2d) 1044, a prosecuting attorney, acting as a private citizen and accompanied by two other private citizens, inquired of the defendant if he could search his premises. He had no search warrant and the defendant permitted him to search the premises and the evidence found on the premises was permitted to be used, even though there was no search warrant and even though the prosecuting attorney was acting as a private citizen. In that case the court said at page 1045:

> "Appellant's constitutional right to freedom from unlawful search of his premises is said to have been invaded. Testimony offered by appellant tended to show that the search, concededly made without a search warrant, was made without his consent. The testimony of the prosecuting attorney and of Ettinger and Howard, given at the hearing on the motion to suppress evidence, tended to prove that appellant expressly and voluntarily consented and agreed that the search might be made without requiring the prosecuting attorney to go to the trouble of procuring a search warrant. In fact, the testimony of these witnesses tended to prove that appellant even aided in carrying out some of the liquor which he had in his house.
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> "The issue of fact to be determined on the motion to suppress evidence was one for the trail(trial) judge. He evidently found that the search was made with the voluntary consent of appellant, and therefore that there was no unlawful search.

> Such finding was well supported by the proof offered on that issue. Hence no error was committed in overruling the motion to suppress evidence, or in admitting in evidence at the trial proof that eight gallons of whisky and other intoxicating liquors were found upon such search. If appellant voluntarily consented to the search, his constitutional rights were in no wise violated.
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> "Even if the prosecuting attorney did go to appellant's home in the purported capacity of a private citizen, accompanied by two other private citizens, and, in such capacity, asked for permission to search appellant's premises without a search warrant, such considerations do not affect the admissibility in evidence of proof of liquor discovered by such search, if in fact such search was made, as the trial judge found, with the voluntary consent of appellant."

The three cases, set out above, undoubtedly hold that Section 11, Article 2, of the Constitution of the State of Missouri, and Amendment IV of the United States' Constitution are only intended as a restriction on the powers of government and not a restraint on the unauthorized acts of individuals.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the copy of Motion to Suppress Evidence attached to your request should not lie and should be overruled.

It is further the opinion of this department that the watch obtained, as set out in your request, is competent and admissible evidence and was not obtained in violation of Section 11, Article 2, of the Constitution of the State of Missouri, or Amendment IV of the Constitution of the United States.

Respectfully submitted,

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APPROVED:

TYRE W. BURTON
(Acting) Attorney General

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