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The United States Supreme Court Modifies the Exclusionary Rule: *United States v. Leon* and *Massachusetts v. Sheppard*

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The United States Supreme Court has ruled that the Fourth Amendment exclusionary rule does not apply when a law enforcement officer conducts a search in objectively reasonable reliance on a search warrant that is issued by a detached and neutral magistrate but is later determined to be invalid. *United States v. Leon,* 35 Crim. L. Rep. 3273 (5 July 1984); *Massachusetts v. Sheppard,* 35 Crim. L. Rep. 3296 (5 July 1984). This memorandum will discuss the Court's ruling and its application in North Carolina.

The *Leon* and *Sheppard* Cases

A Review

Before discussing the Court's ruling, it is useful to review the facts in the two cases.

The Leon case. In *Leon* a confidential informant of unproven reliability told a police officer in Burbank, California, that two people were selling large quantities of drugs from their residence. The informant also told the officer that he had witnessed a sale of drugs at the residence five months earlier. In addition, he said that only small quantities of drugs were kept at that residence, the rest being stored elsewhere. As a result of an extensive police investigation, an experienced Burbank drug investigator prepared an application for a search warrant to search several residences and cars. Several deputy district attorneys reviewed the application, which was submitted to a state superior court judge, who issued a search warrant. Drugs were found in the search that ensued, and a federal grand jury indicted several defendants.

A federal district court judge suppressed the evidence that resulted from the issuance of that search warrant (as to defendants who had standing) because he concluded that the affidavit was insufficient to establish probable cause. The Ninth Circuit Court of Appeals affirmed. It ruled that the affidavit failed to establish the informant's credibility, and the informant's information about criminal activity was fatally stale. Therefore the affidavit failed the two-prong test of *Aguilar* and *Spinelli.* And the officer's independent investigation neither cured the staleness nor sufficiently corroborated the details supplied by the informant. [The Ninth Circuit's opinion was written before the Supreme Court's decision in *Illinois v. Gates,* 33 Crim. L. Rep. 3109 (8 June 1983), which rejected the two-prong test of *Aguilar* and *Spinelli* and substituted a totality-of-the-circumstances approach in evaluating probable cause. However, for the purpose of deciding this case, the Supreme Court assumed that the Ninth Circuit was correct in finding no probable cause.]

The Sheppard case. After collecting evidence in a homicide investigation, a Boston detective drafted an affidavit to support an application for a search warrant to search a suspect's home for the victim's possessions, the possible murder weapon, and other items. He showed the affidavit to the district attorney, an assistant district at-

torney, and a police sergeant; all concluded that it set forth probable cause. Because he could not find an appropriate warrant form, the detective used a preprinted search warrant designed for use in searches for controlled substances. The detective realized that some changes would have to be made on the warrant; he made some changes but not all that should have been made.

The detective took the affidavit and warrant to a judge and showed him the changes on the warrant he had made to delete the drug references. The judge told the detective that he would make any other necessary changes. The judge made some changes, returned the affidavit and warrant to the detective, and told him that the warrant was sufficient to carry out the search he had requested. But the judge had not changed the language in the warrant that specified the objects to be seized; therefore the warrant authorized a "search for any controlled substance, article, implement or other paraphernalia" used in connection with controlled substances.

At the pretrial suppression hearing, the trial judge ruled that the search warrant was defective because it did not particularly describe the items to be seized as the Fourth Amendment requires. The incriminating evidence found was ruled inadmissible. The Massachusetts Supreme Judicial Court affirmed.

Reasons for Modifying the Exclusionary Rule

Justice White wrote the Court's opinion in both *Leon* (the lead case) and *Sheppard.* The following material summarizes and paraphrases his analysis and reasoning for modifying the exclusionary rule.

The Fourth Amendment does not expressly preclude the use of evidence obtained in violation of its commands. The wrong condemned by the Fourth Amendment is the unlawful search or seizure itself, and the exclusionary rule is not intended to cure the violation of the defendant's rights, nor is it able to do so. The rule is a judicially created remedy designed to safeguard a person's Fourth Amendment rights through its deterrent effect. It is not a personal constitutional right.

The appropriateness of imposing the exclusionary rule must be determined by weighing the costs and benefits of preventing the use in the prosecution's case-in-chief[1] of inherently trustworthy evidence that was obtained in reliance on a search warrant that was issued by a detached and neutral magistrate but ultimately was found to be defective.

One cost of the exclusionary rule is that it interferes with the truth-finding functions of the jury and judge, and some guilty defendants may therefore go free or receive reduced sentences from favorable pleas bargains. Particularly when law enforcement officers have acted in objective good faith or when their errors have been minor, the magnitude of the benefits conferred on guilty defendants generates disrespect for the law and administration of justice. Thus the rule's application must be restricted to those situations in which its remedial objectives will be best served.

There are at least three reasons why the exclusionary rule generally should not apply to search warrants. First, the rule is designed to deter police misconduct rather than to punish errors of judges and magistrates. Second, there is no evidence that judges and magistrates ignore or subvert the Fourth Amendment so often that the exclusionary sanction should routinely apply. Third, and most important, there is no basis for believing that exclusion of evidence seized pursuant to a search warrant will have a significant deterrent effect on judges or magistrates who issue search warrants.

If the exclusion of evidence obtained pursuant to a subsequently invalidated search warrant is to have a deterrent effect, it must alter the behavior of individual officers or departmental policies. But there is no exceptionable behavior to deter when an officer acts with objective good faith in obtaining a search warrant and acts within its scope. Penalizing the officer for the magistrate's or judge's error, not his own, cannot logically contribute to deterring violations of the Fourth Amendment. Therefore the marginal or nonexistent benefits produced from suppressing evidence obtained in objectively reasonable reliance on a search warrant that is later invalidated cannot justify the substantial costs of exclusion.

The Ruling and "Objectively Reasonable Reliance"

The Court ruled that the exclusionary rule does not apply when an officer who is conducting[2] a search acts in "objectively reasonable reliance" on a search warrant that is issued by a detached and neutral magistrate but is later determined to be invalid.

What is "objectively reasonable reliance?" Justice White attempted to explain the meaning of this phrase in footnotes 20 and 23 of his opinion. To determine whether an officer acted in "objectively reasonable reliance," a reviewing judge must confine his inquiry to the "objectively

1. The Supreme Court previously has ruled that the exclusionary rule does not prevent the use of evidence obtained in violation of the Fourth Amendment to impeach a defendant's testimony on (1) direct examination, or (2) cross-examination that is reasonably suggested by the defendant's testimony on direct examination. United States v. Havens, 446 U.S. 620 (1980); Walder v. United States 347 U.S. 62 (1954).

2. Justice White makes it clear in footnote 24 of the Court's opinion that "[i]t is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search." 35 Crim. L. Rep. 3273, 3280 (5 July 1984).

ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, all of the circumstances—including whether the warrant application had previously been rejected by a different magistrate—may be considered."[3] For purposes of applying this standard, all officers are assumed to have a reasonable knowledge of the law.[4] The Court clearly rejected[5] any consideration of the individual officer's subjective good-faith belief that what he was doing was lawful. Thus if a reasonably well-trained officer would have known what he was doing was violating the Fourth Amendment, the exclusionary rule would apply even though the actual officer involved in the search honestly believed (through lack of training or otherwise) that he was not violating the law.[6]

How does a reviewing judge determine what a reasonably well-trained officer should know about the Fourth Amendment issue that is involved in the particular case before him? Justice White refers to *Harlow v. Fitzgerald,*[7] which sets out an objective good-faith defense that a public official (with qualified immunity) may assert to defeat a claim against him for allegedly violating someone's constitutional rights. As applied in the context of *Leon,* the standard would be whether the officer's conduct violated "clearly established"[8] Fourth Amendment rights of which a reasonably well-trained officer should have known. If the reviewing judge determines that a particular Fourth Amendment right was violated, he should examine United States Supreme Court decisions (and probably Fourth Circuit and North Carolina Supreme Court decisions)[9] to determine whether that right was clearly established when the officer acted.

Exceptions to the Modified Exclusionary Rule

The Court noted that a search warrant issued by a magistrate or judge normally will suffice to establish that the officer acted in objectively reasonable reliance, but in some circumstances it will be clear that the officer could not reasonably have believed that the search warrant was properly issued. The exclusionary rule still would apply in the following kinds of cases:

—The magistrate or judge was misled in issuing the search warrant by information in the affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. See *Franks v. Delaware,* 438 U.S. 154 (1978).

—The issuing magistrate or judge totally abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979) (magistrate participated with police in execution of search warrant at pornographic book store and directed seizure of items not specified in the warrant).

—The affidavit was so lacking in facts to establish probable cause that an officer's belief that probable cause existed was entirely unreasonable.

—The search warrant was so facially deficient—in not specifying the place to be searched or the things to be seized—that the officers who executed it could not have reasonably presumed it to be valid. (But note the unusual facts in the *Sheppard* case.)

Applying the Modification of the Exclusionary Rule in *Leon* and *Sheppard*

In *Leon,* the Court determined that the officer's application for the search warrant was supported by much more than a "bare bones" affidavit. Furthermore, the affidavit related the results of an extensive police investigation that, " . . . as the opinions of the divided panel of the

3. 35 Crim. L. Rep. at 3280, n. 23.

4. *Id.* at 3279, n. 20.

5. However, cases since *Harlow* (discussed in next paragraph of the text) have ruled that the subjective element of the good-faith standard still exists. *See, e.g.,* McElveen v. County of Prince William, 725 F.2d 954 (4th Cir. 1984). The Fourth Circuit in *McElveen* had a strained analysis of *Harlow,* which appears even more strained in light of Justice White's comments about *Harlow* in the *Leon* case and Justice Powell's discussion in Davis v. Scherer, 52 U.S.L.W. 4956, 4958 (28 June 1984) (Harlow established "wholly objective standard").

But see notes 8 and 21, which discuss a limited exception to a wholly objective standard when the officer *knew* what he was doing was in violation of the Fourth Amendment.

6. 35 Crim. L. Rep. at 3279, n. 20.

7. 457 U.S. 800 (1982).

8. The term "clearly established" is used in the *Harlow* case, 457 U.S. 800, 818. Justice Brennan, dissenting in *Leon,* describes the court's test as whether an officer reasonably should understand because the law is "well-settled." 35 Crim. L. Rep. at 3288. This phrase appears to have a meaning similar to "clearly established."

What if the officer actually knows (because he is extremely well trained) that he was violating law even though a reasonably well-trained officer would not have known? In his dissenting opinion in INS v. Lopez-Mendoza, 35 Crim. L. Rep. 3310, 3317 (5 July 1984), Justice White indicated that actual knowledge would require application of the exclusionary rule. This would be an exception to a totally objective standard, since testimony would have to be taken to determine whether the individual officer involved in the search actually knew that what he was doing was unlawful. *See also* Justice Brennan's concurring opinion in Harlow v. Fitzgerald, 457 U.S. at 820-21.

If the *Harlow* test is used to defeat the defendant's motion to suppress, it would appear to foreclose through collateral estoppel a federal civil rights suit based on the same grounds that were advanced at the suppression hearing. *See* Allen v. McCurry, 449 U.S. 90 (1980).

9. The Supreme Court has not set clear guidelines about which courts' opinions should be examined in deciding whether the law is clearly established. Obviously the law is clearly established if the United States Supreme Court has said so, but beyond that, it is uncertain what sources are authoritative. *See generally* Smith, Qualified Immunity from Liability for Violations of Federal Rights—A Modification, Local Gov't Law Bull. No. 23, (Institute of Government, The University of North Carolina at Chapel Hill, January, 1983); Comment, *Harlow v. Fitzgerald:* The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983, 132 U. Pa. L. Rev. 901 (1984).

For examples of how federal courts analyze police conduct under the *Harlow* test, *see* Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982), *cert. denied,* 103 S.Ct. 1253 (1983); Silverman v. Ballantine, 694 F.2d 1091 (7th Cir. 1982); Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982); Dale v. Bartels, 732 F.2d 278 (2d Cir. 1984).

Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate."[10]

In *Sheppard,* the Court rejected the defendant's contention that since the officer knew beforehand that the warrant form was defective, he should have examined it to make sure that necessary changes had been made. The Court noted that this argument was based on the premise that the officer had a duty to disregard the judge's assurance that the requested search was authorized and the necessary changes had been made. Noting that this case did not pose the question of what duty an officer had when he executes a warrant without knowing beforehand what items are to be seized (here the officer who applied for the warrant also executed it), the Court stated that ". . . we refuse to rule that an officer is required to disbelieve a judge who had just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."[11] Suppressing evidence on the basis of the judge's critical mistake will not serve the deterrent function that the exclusionary rule was designed to achieve. Therefore the evidence should not be suppressed.

Applying *Leon* and *Sheppard* to warrantless searches and seizures.

The decisions in *Leon* and *Sheppard* have modified the exclusionary rule when searches have been made pursuant to invalid search warrants. Is it likely the Court later will extend the modification to warrantless searches and seizures (for example, arrests, searches made under exigent circumstances, etc.)? I believe the answer is yes.

The basic rationale underlying the Court's view of the exclusionary rule is that the rule is to have any deterrent effect, "it must alter the behavior of individual law enforcement officers or the policies of their departments."[12] It would follow that if officers have acted in objective good faith in making a warrantless search or seizure that was later ruled unconstitutional, then excluding evidence obtained from such a search or seizure cannot serve to deter them. Therefore, the Court's extension of *Leon* and *Sheppard* to warrantless searches and seizures would appear likely.

A possible indication[13] of whether the Court would extend its ruling to warrantless searches and seizures appears in a case decided on the same day, *INS v. Lopez-Mendoza,* 35 Crim. L. Rep. 3310 (5 July 1984). In this case an alien admitted, after an unlawful warrantless arrest, that he was unlawfully present in the United States; the issue was whether this admission must be excluded as evidence in a civil deportation hearing. The Court decided that the exclusionary rule should not apply in such hearings. Justice White dissented. The significant point in his dissenting opinion was his statement that although he would apply the exclusionary rule in such hearings, he would modify it by applying the *Leon* test to the officers' conduct to determine whether they were acting in objective good faith in making their warrantless arrest. (As noted above, Justice White wrote the *Leon* and *Sheppard* opinions.)

Applying the Modification to the Exclusionary Rule in North Carolina

Neither the North Carolina Constitution[14] nor the General Statutes[15] mandate the exclusion of evidence obtained as a result of a constitutional violation. Therefore the *Leon* and *Sheppard* rulings apply fully in North Carolina.

Conducting the Suppression Hearing

It is important to remember that the *Leon* and *Sheppard* rulings did not affect other Supreme Court decisions that had already narrowed the scope of the exclusionary rule. Thus evidence is not to be excluded if the defendant's own Fourth Amendment rights have not been violated (lack of standing),[16] or if the evidence was obtained independent-

10. 35 Crim. L. Rep. at 3281.

11. *Id.* at 3298.

12. *Id.* at 3279. One can argue that the *Leon* and *Sheppard* rulings also rested on the exclusionary rule's limited deterrent value against judges and magistrates. Obviously this rationale would not support extension of the exclusionary rule modification to warrantless searches and seizures. However, I believe that a majority of the Court (in a warrantless search and seizure case) is unlikely to accept that rationale as a necessary condition to further modification of the exclusionary rule.

13. One also might consider Justice Brennan's comments in his dissenting opinion in *Leon:* " . . . the full impact of the Court's regrettable decision will not be felt until the Court attempts to extend this rule to situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances. When that question is finally posed, I for one will not be surprised if my colleagues decide once again that we simply cannot afford to protect Fourth Amendment rights." *Id.* at 3290.

The only federal Court of Appeals to adopt a good-faith exception to the exclusionary rule did not limit the exception to search warrants. United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127 (1981).

14. "Though the language in the North Carolina Constitution (Article I, Sec. 20), providing in substance that any search or seizure must be 'supported by evidence,' is markedly different from that in the federal constitution, there is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States." State v. Hendricks, 43 N.C. App. 245, 251-52 (1979), *cert. denied,* 299 N.C. 123 (1980).

15. N.C. Gen. Stat. § 15A-974 requires the exclusion of evidence only if it is *required* by the United States or North Carolina constitutions or if the evidence is obtained as a result of a substantial violation of the provisions of G.S. Chapter 15A. For an example of how to interpret this statutory exclusionary rule, *see* State v. Richardson, 295 N.C. 309 (1978).

16. Rakas v. Illinois, 439 U.S. 128 (1978); Rawlings v. Kentucky, 448 U.S. 98 (1980).

ly of a constitutional violation,[17] or if it would have been inevitably discovered if the constitutional violation had not occurred.[18] Thus if the evidence is admissible because of one of these exceptions to the exclusionary rule or another already recognized, it is unnecessary to consider the *Leon* and *Sheppard* modification.

Although the trial judge could rule that evidence was admissible on the basis of the officer's objective good faith without ruling on the Fourth Amendment issue,[19] it would be better practice to rule on the Fourth Amendment issue as well. If the trial court has ruled on both issues (assuming that the prosecutor has raised the objective-good-faith issue)[20], an appellate court can review both issues at one time, avoiding unnecessary remands for further hearings.

When deciding the issue of the officer's objective good faith, the trial judge should remember that the decision he must make is a legal issue: would a reasonably well-trained law enforcement officer have known what he was doing was in violation of the Fourth Amendment. It is therefore not necessary to hear evidence or make findings of fact concerning the particular officer's training or knowledge of the Fourth Amendment.[21]

17. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Wong Sun v. United States, 371 U.S. 471 (1963); Segura v. United States, 35 Crim. L. Rep. 3298 (5 July 1984) (information possessed by officers before they illegally entered apartment was an independent source for discovery and seizure of evidence by valid search warrant).

18. Nix v. Williams, 35 Crim. L. Rep. 3119 (11 June 1984) (victim's body would have been inevitably discovered by searching party even if police had not learned of its location by defendant's statements taken in violation of his Sixth Amendment rights). This ruling clearly will apply to Fourth Amdendment violations as well.

19. The Court in *Leon* indicated that that procedure could be followed. 35 Crim. L. Rep. at 3281.

20. The State as well as the defendant must raise appropriate issues at a suppression hearing so that they may be considered there, and the State must make appropriate exceptions to preserve adverse rulings for appellate review. State v. Cooke, 306 N.C. 132 (1982).

21. The one exception would occur when the defendant contended that even though a reasonably well-trained officer would not have known, the particular officer in this case knew what he was doing was in violation of the Fourth Amendment. In such a case, the trial judge should take evidence on the issue of the officer's knowledge and make findings. See the discussion in note 8.

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