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Abstract

Then “good faith” exception to the exclusionary rule recently received explicit impetus from the Fifth Circuit Court of Appeals.

KEYWORDS: Williams, Exclusionary Rule, Fifth Circuit

Criminal Law: Exclusionary Rule United States v. Williams

The "good faith" exception to the exclusionary rule recently received explicit impetus from the Fifth Circuit Court of Appeals. Meeting en banc,[1] a thirteen judge majority held in *United States v. Williams*[2] that evidence discovered by police officers acting in the reasonable good faith that their action was authorized, should not be suppressed merely because this reliance later proved to be unjustified. In coming to this conclusion, the court looked to the purpose of the rule, its success at achieving that purpose, and its effect on the field of criminal justice. Based on these factors, and acknowledging the current contraction of the exclusionary rule, the Fifth Circuit became the first federal appellate court to recognize such an exception.

THE EXCLUSIONARY RULE: HISTORICAL OVERVIEW

The origin of what has become known as the "exclusionary rule" is rooted in the fourth amendment.[3] However, the modern effect of the rule was first promulgated 110 years after the ratification of the amendment.[4] Until that time, the area had been a largely "unexplored territory."[5] Then, in 1914, the Supreme Court held that evidence

1. The case was reheard en banc on the court's own motion. The panel decision is reported as United States v. Williams, 594 F.2d 86, 98 (5th Cir. 1979).

2. 622 F.2d 830 (5th Cir. 1980).

3. 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 person or things to be seized.

4. Boyd v. United States, 116 U.S. 616 (1886), adopted the exclusionary rule while disallowing evidence which the defendant was compelled to produce in violation of the fifth amendment. *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 49-61 (1966).

5. LANDYNSKI, *supra* note 4, at 49.

wrongfully seized by federal officials was not to be admitted in criminal or civil trials.[6] In keeping with the view that the fourth amendment was not applicable against the states, this decision was only binding on federal officials. This concept was affirmed in 1949[7] subject to subsequent limitations.[8] The exclusionary rule was enforced in state courts and against state officials in 1961 when the Court, through the due process clause of the fourteenth amendment, handed down the landmark decision of *Mapp v. Ohio*.[9]

THE PURPOSE OF THE RULE

Three underlying purposes have emerged as a logical rationale for the exclusionary rule. The initial purpose was to protect the privacy of individuals against illegal searches and seizures. However:

> [T]he Supreme Court later downgraded the protection of privacy rationale, perhaps because of the obvious defect that the rule purports to do nothing to recompense innocent victims of Fourth Amendment violations, and the gnawing doubt as to just what right of privacy guilty individuals have in illegal firearms, contraband narcotics and policy betting slips — the frequent objects of search and seizure.[10]

As this rationale fell in disfavor, proponents of the rule turned to a different analysis. In time, a second reasoning developed. It was believed that using illegally obtained evidence brought the court system into disrepute and allowed the judicial system to become tainted by working in partnership with lawbreakers (police who obtain evidence illegally).[11] This thought was succinctly stated by Justice Brandeis

6. Weeks v. United States, 232 U.S. 383 (1914).

7. Wolf v. Colorado, 338 U.S. 25 (1949).

8. In Rochin v. California, 342 U.S. 165 (1952), the Supreme Court excluded evidence that was obtained in a manner which shocked the conscience. *But see* Irvine v. California, 347 U.S. 128 (1954).

9. 367 U.S. 643 (1961).

10. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 47-50 (1977), cited in Wilkey, *The Exclusionary Rule: Why Suppress Evidence,* 62 JUDICATURE 214, 220 (1978) (footnotes omitted).

11. This rationale was summarily treated by Justice Brennan in his dissent in United States v. Calandra, 414 U.S. 338, 357-58 (1971).

when he wrote that "government officials shall be subjected to the same rules of conduct that are commands to the citizen . . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."[12]

The modern rationale for this rule, however, is to deter the police officer from violating the fourth amendment in the first place. "The principle and almost sole theory today is that excluding the evidence will punish the police officers who made the illegal search and seizure or otherwise violated the constitutional rights of the defendant, and thus deter policemen from committing the same violation again."[13] Those advocating a contraction of the rule point out the illogic behind such a purpose.[14] Thus, it is here that the battle lines are drawn.

UNITED STATES v. WILLIAMS: DAWN OF THE GOOD FAITH EXCEPTION

In 1976, Jo Anne Williams was arrested in Ohio by DEA Special Agent Paul Markonni for possession of narcotics. She pleaded guilty and was released on bond pending her appeal. As a condition of her bond, she was restricted in travel to the State of Ohio.

On September 28, 1977, Special Agent Markonni was on duty at the Atlanta International Airport. He observed Williams deplane from a flight arriving from Los Angeles.[15]

Markonni, aware of her travel restrictions, arrested her for violating those restrictions (i.e., bail jumping). Upon this arrest, Williams' person was searched and a packet of an opiate was discovered. Markonni subsequently obtained a warrant to search Williams' luggage and a large quantity of heroin was discovered.

At trial, Williams made a timely motion to suppress all evidence

12. Olmstead v. United States, 277 U.S. 438, 483-85 (1928) (dissenting opinion).

13. Wilkey, *supra* note 10, at 220. *See* Justice Powell's majority opinion at 414 U.S. at 347. *But see* Chief Justice Burger's dissenting opinion in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 338, 416 (1971).

14. Wilkey, *supra* note 10, at 214.

15. Agent Markonni was present at this particular location as part of the DEA's Drug Courier Interdiction Program. Flights arriving from Los Angeles were monitored because the city had been identified as a source of illegal drugs carried by couriers. 594 F.2d at 88 n.5.

seized by government authorities. The magistrate denied this motion. The circuit court disagreed and suppressed the evidence.[16] According to the court's interpretation, Special Agent Markonni did not have the authority to arrest Williams.[17] This conclusion was reached despite the fact that Markonni had a good faith belief that his actions were proper.[18] The court reasoned that this decision would serve as a deterrent to other police activity involving bail jumping.[19]

Because of the strong dichotomy of feelings on this issue, a major-

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16. *Id.* at 91. The court concluded that 18 U.S.C. § 3150 (1976) is violated only for *"the willful failure to appear before any court or judicial officer as required.* (emphasis in original). The mere violation of a *bond condition,* other than a failure to appear as ordered, is not a criminal offense within the meaning of section 3150." (citations omitted) (emphasis supplied).

17. *Id.* at 92. The court declared that 18 U.S.C. § 401(3) (1970) empowered *only* a court to punish disobedience or contempt of its order by fine or imprisonment, and that 18 U.S.C. § 3146 (1970) initiates only judicial authority and empowers a court, not a DEA agent, to determine whether punitive action is warranted. *Id.* The following relevant portions were cited by the court: 18 U.S.C. § 401 (1976) provides: *"A court of the United States* shall have power to punish by fine or imprisonment, at *its discretion,* such contempt of its authority, and none other as . . . (emphasis in original). (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." *Id.* 18 U.S.C. § 3146 provides:

> (a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods or relief, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions; . . .
>
> (2) place restrictions on the travel, association, or place of abode of the person during the period of release . . . .
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> (c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

18. 622 F.2d at 846. *But see* United States v. Avery, 447 F.2d 978 (4th Cir. 1971), *cert. denied,* 405 U.S. 930 (1972), cited at 594 F.2d at 93.

19. 594 F.2d at 96 n. 18.

ity of the judges in active service granted their own motion to rehear the case *en banc* on briefs and without oral argument.

The en banc court reversed with alternative holdings. Although all felt the arrest was valid, ten of the twenty-four judges avoided the exclusionary rule question by concluding that the search and seizure were proper,[20] and went no further. However, the majority (13) felt that evidence should not be suppressed "under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken belief, that they are authorized."[21] Special Agent Markonni, the court felt, had met this standard.

In coming to this decision, the court relied on the deterrence principle in concluding that "the exclusionary rule exists to deter willful or flagrant actions by police, not *reasonable good faith* ones. Where the reason for the rule ceases, its application must cease also."[22] The court restricted the exclusionary rule "to conform . . . to its underlying purpose: to deter unreasonable or bad faith police conduct."[23] This court thus became the first to explicitly articulate a "good faith" exception to the exclusionary rule.

TREND OF THE GOOD FAITH EXCEPTION

Almost from the beginning, legal scholars were aware that the rule had its shortcomings. Justice Cardozo criticized the rule pointing out that "[t]he criminal is to go free because the constable had blundered . . . . A room is searched against the law, and the body of a man is found . . . . The privacy of the home has been infringed, and the murderer goes free."[24]

In practice, the rule produced a misguided result, protecting the

20. In Judge Politz's special concurring opinion, the ten judges felt that Williams had willfully breached a court order by violating a condition of her release. Such violation, they reasoned, constituted criminal contempt of court, which is considered a crime.

21. 622 F.2d at 840.

22. *Id.* (emphasis added).

23. *Id.* at 847.

24. People v. DeFore, 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587-88 (1926), cited in Wilkey, *supra* note 10, at 221.

guilty rather than the innocent. This sentiment was expressed by Judge Wilkey who stated:

> [A] policy of excluding incriminating evidence can never protect an innocent victim of an illegal search against whom no incriminating evidence is discovered. The only persons protected by the rule are the guilty against whom the most serious reliable evidence should be offered. It cannot be separately argued that the innocent person is protected *in the future* by excluding evidence against the criminal now.[25]

In view of similar feelings that the exclusionary rule was too indiscriminatory in effect,[26] a retreat from the rule began to develop. This retreat also reflected the thoughts of those who felt that the deterrent rationale was no longer a plausible reason for the continued enforcement of the rule.[27] Justice White spoke of this lack of deterrent effect:

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have *no* deterrent effect. The officers, if they do their duty, will act in a similar fashion in similar circumstances in the future . . . .[28]

The position of those who support the good faith exception is based on the belief that:

> [T]he exclusionary rule excludes reliable, probative evidence from the judicial fact-finding process, and thus hampers the determination of the truth. Because exclusion is not a constitutional right, it can and should be employed only where its underlying rationales are served. In cases involving good faith violations, neither deterrence nor the imperative of judicial integrity is positively affected by exclusion. Therefore, a good faith exception should apply to all cases involving good faith mistakes or technical violations.[29]

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25. Wilkey, *supra* note 10, at 223 (emphasis in original).

26. Stone v. Powell, 428 U.S. 465 (1976). *See also* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (Harlan, J., concurring and Burger, C.J., dissenting).

27. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 740 (1972).

28. 428 U.S. at 540 (White, J., dissenting) (emphasis added).

29. Ball, *Good Faith and the Fourth Amendment: The "Reasonableness" Ex-*

In light of this criticism of the exclusionary rule, the United States Supreme Court began to respond. However, strong dissents indicated how widely the court was divided on this issue.[30] This led to a situation where, in the view of the rule's opponents, progress was very slow.

The first step was the recognition that the exclusionary rule was not a requirement of the Constitution, but rather "a judge-made rule drafted to enforce constitutional requirements."[31] This vital realization which is sometimes overlooked caused one writer to respond that:

> The mystique and misunderstanding of the rule causes not only many citizens but also judges and lawyers to feel (not think) that the exclusionary rule was enshrined in the Constitution by the Founding Fathers, and that to abolish it would do violence to the whole sacred Bill of Rights. They appear totally unaware that the rule was not employed in the U.S. during the first 125 years of the Fourth Amendment, that it was devised by the judiciary in the assumed absence of any other method of controlling the police, and that no other country in the civilized world has adopted such a rule.[32]

The next step in the slow process of inhibiting the application of the rule occurred in 1971 when Chief Justice Burger wrote in a dissenting opinion that inadvertent or honest mistakes by the police should not be treated the same as "deliberate or flagrant" violations of the fourth amendment.[33]

Several similar dissents followed in which flagrantly abusive violations were distinguished from technical and good faith violations.[34] During this period, the Supreme Court was limiting the extent of the exclusionary rule.[35] These cases afforded the Fifth Circuit some

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ception to the Exclusionary Rule, 69 J. CRIM. L. & CRIMINOLOGY, 635, 654 (1978).

30. *See* notes 33 and 34 *infra.*

31. 622 F.2d at 841. *E.g.,* 428 U.S. at 482; 414 U.S. at 348.

32. Wilkey, *supra* note 10, at 217 (footnote omitted). *See* 367 U.S. at 661-62 (Black, J., concurring); 428 U.S. at 482 (1976). *Cf.,* 414 U.S. at 360 (Brennan, J., dissenting).

33. 403 U.S. at 418 (Burger, C.J., dissenting).

34. Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part), 428 U.S. at 538 (White, J., dissenting). *See also* A MODEL PENAL CODE OF PRE-ARRAIGNMENT PROCEDURE, § SS 290.2 (Official Draft, 1975), which states that the evidence shall be excluded only if the violation is substantial.

35. In 441 U.S. 338 (1974), the Court held that a witness summoned to appear

analagous support. Acknowledging these criticisms, as well as the increasingly strong Supreme Court support, the court explicitly recognized the "good faith" exception as the law in their jurisdiction.

PARAMETERS OF THE GOOD FAITH EXCEPTION

In handing down this exception, the court recognized that there are two types of "good faith" exceptions, *technical violations* and *good faith mistakes,* both of which occurred in this case.

A technical violation of the fourth amendment occurs where an officer acts in reliance upon a statute which is later declared unconstitutional, a warrant which is reflected as insufficient, or an interpretation of the law which is subsequently overruled.[36] The officer's belief must be *both* bona fide *and* reasonable.[37] Since arrests made in good faith reliance on a statute not yet declared unconstitutional are considered valid in the Fifth Circuit,[38] evidence of other crimes obtained as a result of searches and seizures made incidental to those arrests is admissable.[39] Thus, even though title 18, section 3146 of the United States code was reconstrued by the panel, the court, *en banc,* felt that the officer's reliance was in reasonable good faith and that the evidence should not be excluded.[40] He had acted under a reasonable belief "and

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and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. Similarly, in Michigan v. Tucker, 417 U.S. 433 (1974), the Court admitted evidence obtained as a result of statements taken in complete good faith but without the proper Miranda rights. United States v. Janis, 428 U.S. 433 (1976), held that the exclusionary rule should not exclude evidence in the civil proceeding of one sovereign which was illegally seized by a criminal law enforcement agent of another sovereign. Michigan v. DeFillippo, 443 U.S. 31 (1979), held arrests made in "good faith" reliance that an ordinance is constitutional will not be invalidated if the ordinance is later declared unconstitutional. *Cf.* Ybarra v. Illinois, 444 U.S. 85 (1980), wherein the Court excluded evidence as a violation of the fourth amendment because there was no probable cause.

36. Ball, *supra* note 29, at 641 n.69.

37. *See, e.g.,* 443 U.S. at 38 (1979). *See also* United States v. Peltier, 422 U.S. 531 (1975); United States v. Carden, 529 F.2d 443 (5th Cir. 1976), *cert. denied,* 429 U.S. 848 (1976).

38. Hamrick v. Wainwright, 465 F.2d 940 (5th Cir. 1972); United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971).

39. 465 F.2d 940; 445 F.2d 287.

40. 622 F.2d at 846.

should not be charged with knowledge that a future panel decision would construe § 3146 to apply only to bond jumping that involved missing a court appearance."[41]

A *good faith mistake* occurs from an officer's reasonable but mistaken judgment as to probable cause. In *Williams,* the court held that Special Agent Markonni acted under a reasonable, though mistaken, belief as to the probable cause under which he arrested Williams, because he made a "reasonable factual error about an element of the crime."[42] The court acknowledged that his good faith and reasonableness were not questioned here.

However, the underlying mandate of the *Williams* decision is clear. Henceforth, in the Fifth Circuit:

> [W]hen evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a *reasonable good faith* belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence . . . . We therefore . . . [go] no further than to delineate the "exception" itself explicitly and to recognize that where the proponent establishes it, [reasonable good faith] the evidence should be received if otherwise admissible.[43]

But the court emphasized that this exception will not reward deficient understandings of the law. On the contrary, the court held that the arresting officer's belief:

> [I]n addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulate premises sufficient to cause a reasonable, and reasonably trained officer to believe that he was acting lawfully. Thus, a series of broadcast breakins and searches carried out by a constable — no matter how pure in heart — who had never heard of the fourth amendment could never qualify.[44]

41. *Id.*
42. *Id.*
43. *Id.* (emphasis added).
44. *Id.* at 841 n.4a.

The *Williams* court was attempting to draw a fine line in deciding when evidence should be excluded. Keeping the rule's deterrent intentions in mind, the court is seeking to reward the efforts of officers who have acted in reasonable good faith, while punishing the ignorance of officers whose good faith fails to measure up to the objective standards for the profession. The court thus puts a premium on a quality education for field officers so that they will rigidly adhere to the fourth amendment's confines. On those occasions when a mistake occurs, the fruits of arrests based upon reasonable good-faith reliance as to probable cause will not be excluded. In this manner, the court can both deter bad policework and admit evidence which was obtained legally.

CONCLUSION

In coming to this decision, the court has taken a bold stand on a controversial issue. Because of the disparity of views concerning whether to limit the extent of the rule, this issue will come up again. Four current members of the Supreme Court are in favor of the limitation espoused in this case.[45] Whether this doctrine becomes the law of the land remains to be seen.

This dichotomy was illustrated in the manner in which the court arrived at the decision. Because *all* agreed that the original arrest was valid, ten of the twenty-four felt that the good-faith exception need not have been addressed.[46] This diversity could immunize this case from Supreme Court review.[47]

Although this doctrine is now the law in this circuit, and in view of the Fifth Circuit splitting, its precedential value will be problematical until the Supreme Court rules affirmatively on this issue.

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45. *See* notes 33-35, *supra*. Chief Justice Burger and Justices Powell, White, and Rehnquist have gone on record in support of the good-faith exception.

46. 622 F.2d 848 (Rubin, J., specially concurring).

47. *Id.* at 851.