2-24-1956

People v. Sanders

Roger J. Traynor

[Crim. No. 5763. In Bank. Feb. 24, 1956.]

THE PEOPLE, Appellant, v. JAMES W. SANDERS, Respondent.

[1a, 1b] Searches and Seizures—Justification for.—Where officers went to defendant's phonograph record shop in search of another man they had arrested the day before at such shop for bookmaking, entered the front door which was open to the public, looked through a hole cut in the door to a second room which was not open to the public, and saw defendant, who was known to them personally as a bookmaker, standing behind a desk with a pencil in his hand and some pads of paper in front of him on which there was writing, they were not justified from what they saw in entering the second room without a search warrant to make an arrest and take from defendant's person and premises keys, betting markers, owe sheets and scratch sheets, since there was no basis for concluding that the pads, which could be found in any office, were being used for bookmaking rather than for his business, and no basis for concluding, in the absence of a telephone in such room, that the writing on the pads was in response to calls that might have been made to place or record bets.

[2a, 2b] Arrest—Without Warrant.—The fact that defendant had been a bookmaker in the past or bore that reputation and the fact that another bookmaker had been on his premises the day before would not of themselves constitute reasonable cause to believe that defendant's conduct, which was consistent with

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[1] See **Cal.Jur.**, Searches and Seizures, § 2 et seq.; **Am.Jur.**, Searches and Seizures, § 6 et seq.

[2] See **Cal.Jur.2d**, Arrest, § 7 et seq.; **Am.Jur.**, Arrest, § 22 et seq.

McK. Dig. References: [1] Searches and Seizures, § 1; [2] Arrest, § 5.

the lawful conduct of his business, constituted occupancy of the premises for the purpose of bookmaking, and hence there was no justification for his arrest without a warrant.

APPEAL from an order of the Superior Court of Los Angeles County granting a motion to set aside an information. Allen T. Lynch, Judge. Affirmed.

Edmund G. Brown, Attorney General, William E. James, Deputy Attorney General, S. Ernest Roll, District Attorney (Los Angeles), Jere J. Sullivan and Lewis Watnick, Deputy District Attorneys, for Appellant.

G. Vernon Brumbaugh for Respondent.

A. L. Wirin and Fred Okrand as amici curiae on behalf of Respondent.

TRAYNOR, J.—By information defendant was charged with keeping and occupying a business building for the purpose of horse-race bookmaking in violation of Penal Code, section 337a, subdivision 2. Defendant was arrested at his place of business, and evidence taken by the officers from defendant's person and the premises was introduced at the preliminary hearing. It consisted of keys to the premises that were in defendant's possession, betting markers, owe sheets, and scratch sheets. One of the officers testified that at the time of the arrest he answered the telephone, and a female voice said, "This is Maude. Give me your answer on Devil's Sound in the 2d race at Hialeah." Five or six other callers asked for Jimmy, and when the officer told them that Jimmy had stepped out, they hung up. The officers were not questioned at the preliminary hearing with respect to facts bearing on the legality of their search or the lawfulness of the arrest. When, however, defendant moved to set the information aside on the ground that the evidence was illegally obtained, the parties stipulated to the following additional facts: The officers went to defendant's place of business, a phonograph record shop, in the morning in search of another man they had arrested the day before at the record shop for bookmaking. They entered the front door of the shop, which was open to the public and used to display records. No one was in the front room, and the officers went to a door that separated it from a second room behind, which was not open to the public. There was a large hole

cut in this door, and the officers looked through the hole and saw defendant, who was known to them personally as a bookmaker, in the second room standing with a pencil in his hand. On a table in front of him they observed some pads of paper that appeared to be "the kind and character of pads of paper used in that area where the record shop was located by bookmakers who make book on horse races," and they saw writing on the pads. They then entered the second room without permission by opening the door for the purpose of arresting defendant for bookmaking. They arrested defendant and then secured the evidence introduced at the preliminary hearing by searching the premises. The telephone that the officer answered was located in a third or back room, "entry being made into that room from the center or second room through an opening in a partition which does not have a door." Neither of the officers had a search warrant or a warrant for defendant's arrest.

The trial court held admissible the evidence of what the officers could see by looking through the hole in the door between the room open to the public and the second room that was not. It concluded, however, that what the officers could see from the door was not sufficient to justify their entry without a search warrant to make an arrest, and pointed out that the presence of pads with writing on them, even of the type ordinarily used by bookmakers in the vicinity, was consistent with the legitimate business of a record shop being conducted on the premises. Accordingly, it held that the evidence obtained after the officers entered the second room without a warrant or permission was incompetent, and since the remaining evidence was insufficient, it granted defendant's motion to set the information aside. The People appeal.

The attorney general contends that when the officers looked through the door into the second room, they had reasonable cause to believe that defendant had committed a felony and that he was committing the offense of occupying premises for the purposes of bookmaking in their presence, and that therefore the arrest and search were lawful. (See Pen. Code, § 836, subds. (1), (3); *People* v. *Martin*, 45 Cal.2d 755, 761-762 [290 P.2d 855].) We cannot agree with this contention.

[1a] When the officers looked through the door they saw nothing that was incriminating. They merely saw defendant standing behind a desk with a pencil in his hand and two pads of paper in front of him. There was writing on the pads. Defendant was operating a record store open to the

public, and just as in the case of any shopkeeper, businessman, or professional man, he might reasonably be expected to have pencils and pads of paper available for making notes and memoranda for use in the legitimate conduct of his business. Moreover, the fact that the pads of paper were of the kind used by bookmakers in the area is of no significance. They were ordinary small pads of paper of the sort that may be purchased in any stationery store and that are undoubtedly used by all sorts of persons for all sorts of purposes. Similar pads may be found in almost every office, and certainly, the fact that bookmakers also use them cannot constitute reasonable cause to believe that everyone using them is engaged in bookmaking.

[2a] The attorney general contends, however, that when what the officers saw is viewed in the light of the fact that another person had been arrested at the record shop for bookmaking the day before and the fact that defendant was known personally to them as a bookmaker, reasonable cause for the arrest appears. It is true that the stipulated fact that defendant was known personally to the officers as a bookmaker might be interpreted as of itself justifying an arrest. Thus the stipulation is consistent with the conclusion that before the officers saw defendant in the record shop they knew he had committed felonies for which he was subject to prosecution, and that therefore they were justified in arresting him for such past offenses whenever he was found. Defendant, however, was not arrested for or charged with any offenses other than the one discovered at the time of his arrest, and neither in the trial court nor on appeal has it been contended that the arrest may be justified as one for some past offense. Accordingly, we conclude that the stipulated fact that defendant was a known bookmaker does not mean that he was currently subject to arrest for past bookmaking, but only that he had that reputation or was known to the officers as a person who had been convicted of bookmaking. [1b] As pointed out above, however, before the arrest and search defendant's activities appeared to be perfectly consistent with the lawful conduct of his record business. Defendant was merely present in his office with a pencil in his hand and pads of paper on the table in front of him, and there was no basis for concluding that he was using these items for bookmaking rather than for his business that was then open to the public. Moreover, since there was no telephone in the room where defendant was, or any indication that he had

just completed a telephone call, or that any other person was present, there was absolutely no basis from appearances for concluding that the writing on the pads was in response to a call or calls that might have been made to place bets or to record bets placed by persons visiting the shop.

[2b] The attorney general contends, however, that the officers could reasonably conclude that defendant's apparently innocent activities were bookmaking on the ground that another person had been arrested for bookmaking at the record shop the day before. If it had been stipulated that the other person had been caught in the act of bookmaking on the premises, or that at the time of his arrest, evidence had been obtained that the premises were being used for bookmaking purposes, it might reasonably be contended that when a known bookmaker was found on the premises the next day, there was reasonable cause to believe that he also was occupying them for the purposes of bookmaking. The prosecution made no such showing, however, and the fact that defendant had been a bookmaker in the past or bore that reputation and the fact that another bookmaker had been on the premises the day before, would not of themselves constitute reasonable cause to believe that defendant's conduct, which was perfectly consistent with the lawful conduct of his business, in fact constituted occupancy of the premises for the purpose of bookmaking. (*Pearson* v. *United States,* 150 F.2d 219, 221; *Brown* v. *United States,* 4 F.2d 246, 247; *Baumboy* v. *United States,* 24 F.2d 512, 513; *People* v. *Ford,* 356 Ill. 572, 576 [191 N.E. 315]; see *Brinegar* v. *United States,* 338 U.S. 160, 176-177 [69 S.Ct. 1302, 93 L.Ed. 1879]; *United States* v. *Di Re,* 332 U.S. 581, 592-594 [68 S.Ct. 222, 92 L.Ed. 210]; *Hernandez* v. *United States,* 17 F.2d 373.)

The order is affirmed.

Gibson, C. J., Carter, J., Schauer, J., and McComb, J., concurred.

SPENCE, J.—I dissent.

The evidence admitted at the preliminary hearing clearly showed that defendant had committed, and was committing, a felony at the time of his arrest. The offense with which he was charged is in the nature of a continuing offense, as it covers any person who "keeps or occupies, for any period of time whatsoever, any . . . place . . . with a book or books, paper or papers . . . or paraphernalia, for the purpose of