Hastings Law Journal

Volume 17 | Issue 4 Article 13

1-1966

Fourth Amendment Application to Semi-Public Areas: Smayda v. United States

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FOURTH AMENDMENT APPLICATION TO SEMI-PUBLIC AREAS: *Smayda v. United States*

In *Smayda v. United States*,[1] the Ninth Circuit held that the fourth amendment[2] did not proscribe the clandestine surveillance of public rest rooms by police officers. In two previous cases, however, the Supreme Court of California had held to the contrary.[3] A split was thereby created on an important question of constitutional interpretation—whether or not the fourth amendment protects an individual's right to privacy in a semi-public area.

The question arose on an appeal of conviction under the Assimilated Crimes Act[4] for an infamous crime against nature.[5] Park officials in Yosemite National Park were troubled by apparent use of the public rest rooms for homosexual activities. With the intent of putting a stop to this practice, local park rangers had holes cut in the ceiling above the toilet stalls and disguised them as air vents. Stationed in the attic, they were able to view everything that went on in the stalls. After two nights of watching innocent users, the rangers were successful. Defendants, not knowing the stalls were being watched from above, entered them and committed the criminal act through a hole in the partition separating two of the stalls.

Defendants contended that this was an invasion of privacy, and it therefore violated the fourth amendment. Since this was evidence obtained in violation of their constitutional rights, they continued, it should have been excluded.[6] Defendants relied upon two decisions of the California Supreme Court, *Bielecki v. Superior Court*[7] and *Britt v. Superior Court*.[8] Both cases involved police officers secretly watching the occupants of a public toilet stall from above. Each time a unanimous court held the search to be a violation of the federal and state constitutions.

The Ninth Circuit rejected defendants' arguments:

> We hold that when, as here, the police have reasonable cause to believe that public toilet stalls are being used in the commission of crime, and when, as here, they confine their activities to the times when such crimes are most likely to occur, they are entitled to institute clandestine surveillance The public interest in its privacy, we think, must, to that extent, be subordinated to the public interest in law enforcement.[9]

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[1] 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

[2] "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 " U.S. CONST. amend. IV

[3] Britt v. Superior Court, 58 Cal. 2d 469, 24 Cal. Rptr. 849, 374 P.2d 817 (1962); Bielecki v. Superior Court, 57 Cal. 2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962).

[4] 18 U.S.C. § 13 (1964). This section of the code makes any act or omission, not otherwise punishable by federal law, a federal crime if it is a crime in the state in which the federal territory in which it is committed is situated.

[5] CAL. PEN. CODE § 288a.

[6] Weeks v. United States, 232 U.S. 383 (1914) (evidence obtained in violation of fourth amendment inadmissible in federal courts).

[7] 57 Cal. 2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962).

[8] 58 Cal. 2d 469, 24 Cal. Rptr. 849, 374 P.2d 817 (1962).

[9] 352 F.2d at 257.

The members of the court, however, were not in complete agreement. Each of the three Judges wrote a separate opinion. Judge Dunıway rested his conclusion upon alternative grounds: (a) that when defendants committed these acts in a toilet stall offered to the public, they waived their rights to privacy; *i.e.*, there was no constitutionally protected area,[10] or (b) if the area was constitutionally protected, the search was not unreasonable within the meaning of the amendment.[11] In a concurring opinion, Judge Pope asserted that there was no search, because there was no physical invasion of a protected area.[12] In a vigorous dissent, Judge Browning said the essence of the amendment was intended to insure individual privacy, and the defendants (along with the forty innocent citizens also watched) were entitled to that degree of privacy which they as reasonable persons would expect under the circumstances.[13]

The two opinions of the majority involve three lines of reasoning that need to be examined: (a) there was not a constitutionally protected area; (b) there was not an unreasonable search; (c) there was no search within the meaning of the amendment.

Constitutionally Protected Area?

The Constitution of the United States prohibits only unreasonable searches in certain designated areas—"persons, houses, papers, and effects."[14] Thus, it has been held permissible for an officer to stand in a public area and observe that which is open to him.[15] However, because the Supreme Court has not confined the protection of the amendment to the literal meaning of the words "persons, houses, papers, and effects," the line between a "public" and a "non-public" place is difficult to draw.

The Court has held a hotel room to be within the amendment.[16] In *Gouled v. United States*,[17] the Court with no discussion assumed a private office would be a constitutionally protected area. The Court has stretched considerably the language of the amendment in holding one's automobile to be within its ambit.[18] Extending this principle further, the Court included a taxi.[19] The defendants in the instant case urged that if an automobile, which is obviously not a house, is within the protection of the amendment, a toilet stall where one seeks seclusion should also be within this protection.[20]

Judge Dunıway, apparently impressed by the lower court's statements to the effect that one could tell from the public parts of the rest room what the de-

[10] *Id.* at 254.

[11] *Id.* at 255.

[12] *Id.* at 257.

[13] *Id.* at 260.

[14] Hester v. United States, 265 U.S. 57, 59 (1924).

[15] United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949).

[16] Jones v. United States, 362 U.S. 257 (1960).

[17] 255 U.S. 298 (1921).

[18] Henry v. United States, 361 U.S. 98 (1959). *But cf.* Carroll v. United States, 267 U.S. 132 (1925).

[19] Rios v. United States, 364 U.S. 253 (1960).

[20] 352 F.2d at 256.

fendants were doing,[21] answered saying, "no case has yet stretched the Fourth Amendment to make its restrictions applicable to a public place. We decline to be the first court to do so, and we think that these stalls were, in essence, a public place."[22] However, he later retreats from this strong position: "We agree that every person who enters an enclosed stall in a public toilet is entitled to believe that, while there, he will have at least the modicum of privacy that its design affords. We would not uphold a clandestine surveillance of such an area without cause."[23] If the area was "in essence public" as he says, officers could search at will.[24] Though this language is confusing, it would seem that Judge Dunlway meant that a toilet stall would not be constitutionally protected.

It is an uncomplicated and perhaps an easy solution for a court to decline to extend a decisional trend to a fact situation upon which the Supreme Court has not ruled.[25] However, does such timidity give adequate treatment to claimed constitutional rights? Is it in accord with the Supreme Court's enunciations as to the *purpose* and *nature* of the fourth amendment?

As far back as 1886, the Court stated that the fourth and fifth amendments overlap each other[26] and that their doctrines "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and *the privacies of life.*"[27] Case after case speaks of the fourth amendment as intended to safeguard individual privacy.[28] The Court said in *Wolf v. Colorado*,[29] "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[30] Thus, it is well settled that the fourth amendment was intended to safeguard the privacy of the individual.

Conceding that the essence of the fourth amendment is the right to individual privacy, how is this right to be construed? It was said in *Davis v. United States*,[31] "The Amendment has not been read in a niggardly spirit with the outlook of a narrow-minded lawyer."[32] Again in *Go-Bart Importing Co. v. United States*,[33] Justice Butler said, "The amendment is to be liberally construed and all owe

[21] *Id.* at 254.

[22] *Id.* at 255.

[23] *Id.* at 257.

[24] See Hester v. United States, 265 U.S. 57, 59 (1924).

[25] In fairness to the court, it must be acknowledged that this was not the extent of its reasoning. But here we are concerned only with the question of whether a semi-public area, a toilet stall, can be held to be a constitutionally protected area. The court's other arguments will be examined later.

[26] Boyd v. United States, 116 U.S. 616 (1886).

[27] *Id.* at 630. (Emphasis added.)

[28] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Silverman v. United States, 365 U.S. 505 (1961); McDonald v. United States, 335 U.S. 451 (1948); Weeks v. United States, 232 U.S. 383 (1914).

[29] 338 U.S. 25 (1949).

[30] *Id.* at 27.

[31] 328 U.S. 582 (1946).

[32] *Id.* at 607 (dissenting opinion).

[33] 282 U.S. 344 (1931).

the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."[34]

In light of this language to the effect that the amendment protects the right to privacy, and that it is to be liberally construed to that end, it seems that a strong argument could be made for extending the protection of the amendment to the rest rooms in *Smayda*. In accordance with ordinary human understanding, a toilet stall offers a certain degree of privacy. It is that right to privacy which the amendment should protect.

Judge Browning in dissent adopted this view, stating, "In sum, the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances."[35] This view was also taken in *Britt v. Superior Court*:[36] "Man's constitutionally protected right of personal privacy not only abides with him while he is the householder within his own castle but cloaks him when as a member of the public he is temporarily occupying a room—including a toilet stall—to the extent that it is offered to the public for private, however transient use."[37]

The fourth amendment is a balance between two sometimes conflicting interests—the interest of society in its right to privacy and its interest in suppression of crime. It is arguable that the amendment, in establishing zones of guaranteed privacy, ought to be strictly construed lest law enforcement be unduly fettered. It has been said that to make these semi-public areas "off limits" to police would encourage their use by the criminal element.[38] This argument weighed heavily with Judge Dunniway:

> [T]he nature of the criminal activities that can and do occur in it, the ready availability therein of a receptacle for disposing of incriminating evidence, and the right of the public to expect that the police will put a stop to its use as a resort for crime all join to require a reasonable limitation upon the right of privacy.[39]

However, is the fact that a semi-public area might be used in the commission of crime sufficient reason to give police free reign in searching such areas? Are not houses, persons, or even automobiles often used for criminal means? It seems that the rights of the innocent are blinded by the zeal to suppress the criminal element. There seems to be something unpalatable in saying, "Come! Use our rest room! It will afford the privacy you desire. True, its privacy is not absolute, but, according to the customs of mankind, no one will peer over the partition at you." Then, when the citizen enters, secure in the thought that he is alone, the Government surreptitiously "enters" and shares with him that which he did not intend to be shared. Is this the type of Government activity the Founders intended when they drafted the fourth amendment?

At best Judge Dunniway's opinion that the toilet stall is "in essence public" is questionable. However, he offered an alternative ground for decision; that the search was not unreasonable.

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[34] *Id.* at 357.
[35] 352 F.2d at 260.
[36] 58 Cal. 2d 469, 24 Cal. Rptr. 849, 374 P.2d 817 (1962).
[37] *Id.* at 472, 24 Cal. Rptr. at 851, 374 P.2d at 819.
[38] People v. Young, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492 (1963).
[39] 352 F.2d at 257.

Unreasonable Search?

The Constitution does not forbid all searches—only those which are unreasonable.[40] Generally, a search of a constitutionally protected area without a warrant is unreasonable.[41] There are, however, exceptions to this rule. An officer may make a search of an area or person as an incident to a lawful arrest.[42] Exceptional circumstances, such as those involving a fleeing felon, danger of destruction of evidence, or a crime committed in the presence of a police officer, will also dispense with the requirement of a warrant.[43] An automobile may be searched upon probable cause on the principle that if an officer obtains a warrant, the car may be moved out of the jurisdiction.[44] For the most part, however, the Court has been strict in the requirement of a warrant, placing upon the one who conducted the search the burden of showing that "exigencies of the moment" existed.[45]

In *Smayda*, Judge Dumway concludes that the search there involved was not unreasonable because there was probable cause to believe the stalls were being used in the commission of crime.[46] Assuming these stalls to be constitutionally protected, this conclusion conflicts with the Supreme Court's pronouncements that probable cause in the absence of exceptional circumstances is not enough to dispense with a warrant.[47]

In *Johnson v. United States*,[48] narcotic agents smelled opium and had reports of its use by the occupant of a hotel room. They knocked on the door and, when Mrs. Johnson answered, smelled fresh opium burning. They then pushed open the door and searched the immediate area. In declaring the search unreasonable, Justice Jackson said, "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."[49] Justice Douglas also condemned a search claimed to be made on probable cause in *McDonald v. United States*:[50]

> The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.

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[40] U.S. CONST. amend. IV See United States v. Rabinowitz, 339 U.S. 56 (1950).

[41] See Ker v. California, 374 U.S. 23 (1963); United States v. Rabinowitz, 339 U.S. 56 (1950); Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921).

[42] Cases cited note 41, *supra.*

[43] United States v. Johnson, 333 U.S. 10, 11 (1948) (dictum).

[44] Henry v. United States, 361 U.S. 98 (1959) (dictum); Brinegar v. United States, 328 U.S. 160 (1949); United States v. Carroll, 267 U.S. 132 (1925).

[45] United States v. McDonald, 335 U.S. 451 (1948).

[46] 352 F.2d at 257. Note that the court was not speaking about probable cause to make an arrest. Indeed, until the officers had made their "search" they had no grounds to make an arrest.

[47] Wong Sun v. United States, 371 U.S. 471, 497-98 (1963) (concurring opinion); United States v. Jeffers, 342 U.S. 48, 52 (1951); Johnson v. United States, 333 U.S. 10, 15 (1948).

[48] 333 U.S. 10 (1948).

[49] *Id.* at 14.

[50] 335 U.S. 451 (1948).

> And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.[51]

In the instant case there were no exceptional circumstances. The park rangers were not in danger of having evidence destroyed. There was no cry of help in the night or felon in flight. On the contrary, they had time to devise the scheme, have the holes cut, and set up watches. Can it be doubted, then, that the rangers had time to go before a magistrate and let him make his impartial determination as to whether or not a warrant should be issued?[52] To hold, as Judge Dumway did, that probable cause will support this search is very questionable.

Was There a Search?

Mere observation of what is open and patent does not constitute a search within the meaning of the fourth amendment.[53] An officer may use a mechanical device to aid his vision or his hearing, and as long as he does not physically invade the constitutionally protected area, there is no fourth amendment search.[54] The analogy is made in the opinion of Judge Pope to an officer standing on the sidewalk and looking into a window. The officers in *Smayda* did not enter the stall but merely observed from above in the attic. Therefore, Judge Pope concluded, there was no physical invasion and no search. The problem arises, however, when we remember someone had to cut the holes and disguise them as air vents. This was a physical invasion. To get around the problem, Judge Pope argued that an invasion made by a private individual[55] does not come within the amendment. In support of this principle, he relies upon the case of *Burdeau v. McDowell.*[56] In that case, a thief had entered a private office, broken into a safe, and stolen private documents. He then, in his own self interest, turned them over to federal officers. The government in no way participated in the search, and the Court took pains to point this out.

In *Smayda,* however, the officers were involved in every phase of the search. They originated the scheme to cut the holes and did all of the actual watching.[57] Where officers participate in a search or encourage it in any way, the evidence so obtained is deemed to be the product of unreasonable search.[58] Thus *Burdeau* would not be applicable to the facts in *Smayda.*

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[51] *Id.* at 455-56.

[52] See Trupiano v. United States, 334 U.S. 699 (1948). *But cf.* United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (search without warrant not illegal merely because officers had time to obtain warrant).

[53] United States v. Lee, 274 U.S. 559 (1927).

[54] Goldman v. United States, 316 U.S. 129 (1942) (detectophone). *But see* Silverman v. United States, 365 U.S. 505 (1961) (use of "spike mike" illegal).

[55] The holes were cut and disguised as air vents by private carpenters who were acting on orders from the ranger.

[56] 256 U.S. 465 (1921).

[57] "As a result, the manager of the resort discussed the problem with Ranger Twight, the law enforcement specialist in the Park, and it was decided that a hole should be cut in the ceiling over each stall, for purposes of observation." 352 F.2d at 253.

[58] Lustig v. United States, 338 U.S. 74, 79 (1949); Byars v. United States, 273 U.S. 28, 33 (1927).

Effects

Since certiorari has been denied and *Smayda* would seem to be the law, what effect will it have on cases involving similar circumstances? How far reaching is the logic involved? Is there a distinction to be drawn between the rest rooms frequented by women and those by men? Or are they both "in essence public," so that store detectives or small town constables may with impunity secretly watch women's dressing rooms in department stores in order to apprehend imagined shoplifters? Consider the telephone booth[59]—is that, too, "in essence public"? Every time the citizen places a call in one of these booths, must he fear that members of the police are listening, because they suspect bookmaking? What about the forty innocent users of the rest room in the instant case? Would they not be justifiably indigant at being watched? All of these instances would seem to come within the logic used in *Smayda.*

Had the decision been overruled by the Supreme Court, the type of clandestine search conducted in the instant case would probably not be possible.[60] Would it then follow that public rest rooms would become havens for panderers, pickpockets, narcotic peddlers, and perverts? Could not an officer be stationed in the rest room merely as a visible deterrent in problem facilities? Or, if a clandestine search is necessary, could it not be conducted from the public portion of the rest room, where the public is free to circulate? This would have the virtue of affording innocent users the modicum of privacy which the facility provides, yet would still give the police opportunity to detect suspicious activity. Or, in a problem rest room, perhaps the doors could be removed altogether. Their removal would eliminate privacy, to be sure, but it would not smack of deceit (as did the facts of *Smayda*). One would be free to exercise his own choice to waive his right to privacy. In this situation, there would be no misleading appearance of privacy. It would seem that law enforcement could be carried out effectively without the need to watch in secret the rather delicate activities carried out in toilet stalls.

Conclusion

As shown, the decision in *Smayda* rested upon three grounds. Two of the three seem to be clearly erroneous. First, because there were no exceptional circumstances which would justify dispensing with the requirement of a warrant, the search was unreasonable notwithstanding probable cause to believe the facilities were being used for criminal activity. Second, the officers participated in every phase of the operation; this fact would take the case out of the *Burdeau* doctrine, and make it a "search" within the meaning of the fourth amendment.

Finally, we are left with the argument that these stalls are not constitutionally

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[59] See United States v. Stone, 232 F Supp. 396 (N.D. Tex. 1964) (holding telephone booth to be constitutionally protected area). *Contra,* United States v. Borgese, 235 F Supp. 286 (S.D.N.Y. 1964).

[60] If it were decided that officers would need a warrant to conduct this kind of search, this type of search would all but be eliminated. Since the warrant would necessarily authorize the spying upon innocent and guilty alike it would be in danger of being struck down as authorizing a general exploratory search. See Stanford v. Texas, 379 U.S. 476 (1965), where the Court invalidated a search because the warrant was too general and in effect authorized an exploratory search. FED. R. CRIM. P. 41(b) authorizes search warrants for search and seizure of certain property. It is doubtful that a warrant could be issued for general surveillance, as opposed to searches for certain property.