The Constable Has Blundered

The Exclusionary Rule, Crime, and Corruption

SECOND EDITION

Walter P. Signorelli

The Constable Has Blundered

The Exclusionary Rule, Crime, and Corruption

SECOND EDITION

Walter P. Signorelli

Carolina Academic Press
Durham, North Carolina

Library of Congress Cataloging-in-Publication Data

Signorelli, Walter P.
The constable has blundered : the exclusionary rule, crime, and corruption /
Walter P. Signorelli. -- 2nd ed.
p. cm.
Includes index.
ISBN 978-1-61163-102-9 (alk. paper)
1. Exclusionary rule (Evidence)--United States. I. Title.

KF9662.S56 2011
347.73'62--dc23

2011036566

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

The Constable Has Blundered

Introduction

For more than four decades in my roles as a police officer and as a criminal defense attorney, I have encountered problems created by the exclusionary rule, and I believe that the insidious effects of the rule have significantly undermined trust in the law enforcement community and the criminal justice system. In 1967, when I joined the New York City Police Department as a rookie police officer, the nation was experiencing a tumultuous period with anti-Vietnam war protests, the civil rights movement, and the burgeoning of an anti-establishment counterculture. It was an interesting time to be a police officer, and I was proud to be part of the law enforcement community. This was before the surfacing of the worst police corruption scandals in New York City history, before the 1971–1972 Knapp Commission investigation into police corruption that was later depicted in such popular films as *Serpico*, with Al Pacino acting as Officer Frank Serpico, and *The Prince of the City*, with Treat Williams acting as Detective Robert Leuci.

Most of the public was surprised and outraged at the extent of police corruption that existed at that time; however, little was done to determine or cure the underlying causes that led to such corruption. The police department restructured its organizational chart to increase supervision, accountability, and discipline, but these measures dealt more with the symptoms of corruption rather than with the causes. At a time when academics, politicians, and administrators had been focusing on the need to address the root causes of crime, delinquency, drug abuse, poverty, and racism, it was odd that the root causes of police corruption seemed not to be of concern. It was as though everyone believed the police were inherently corrupt and would always be corrupt. The only thing to do was to put in controls and to keep the corruption to a minimum.

Greed, egoism, and the opportunity for illegitimate gains are obvious causes of corruption, but they are not reserved to police officers and police work. What is unique to police work is the constant exposure to unsatisfactory and unjust outcomes in the criminal justice system. Police officers see hypocrisy everywhere in the system, and believe they are the scapegoats for the system's failures. They find themselves under constant criticism, and they respond with the colloquial maxim, "Damned if you do; damned if you don't."

The exclusionary rule is the most direct and consequential means of second-guessing and criticizing the work of police officers. The rule requires that evidence obtained in violation of constitutional rights cannot be used in a criminal trial. Officers, who believe that they acted properly while making an arrest or searching for evidence, find themselves criticized for their efforts and see criminals set free because of what the officers believe are impractical and, sometimes, incomprehensible rules. The suppression of otherwise reliable evidence negatively affects police morale and causes the resentment, cynicism, and rebelliousness that often are the precursors to corruption.

My first exposure to the exclusionary rule occurred with my first arrest. It was a routine case, but it introduced me to the ambiguities and injustices of the exclusionary rule that I would face for the next thirty years as an officer and for another ten years as a criminal defense attorney.

The case began when my partner and I were assigned to a patrol car in the Bedford-Stuyvesant section of Brooklyn. It was a summer day at a time when crime was on the rise because of an epidemic of heroin addiction in New York and other cities. The police radio dispatcher directed us to investigate a 911 call about suspicious men loitering in the hallway of an apartment building. Since we were not far from the location, we arrived within two minutes. The building was a rundown, four-story tenement, and we immediately noticed that the glass pane of the unlocked front door was broken. Upon entering the lobby, we observed two young men hurrying down the staircase toward us. To the right of the stairs was a window to a courtyard; to the left, a bank of mailboxes. My partner stopped and questioned the first man who came down the stairs, taking him toward the mailboxes. I attempted to stop the second man, who was about twenty-five years old, six-feet tall, of medium build, and wearing a red bandana on his head. He kept moving from side to side trying to get around me, but I blocked his path. He turned his back to me and, while trying to block my view, put or dropped a red and white Marlboro cigarette box on the windowsill as he moved toward the stairs. I picked up the Marlboro box, opened the lid, and saw a batch of glassine envelopes containing a white powder that looked like heroin. I said, "You're under arrest," but as I reached for my handcuffs, he bolted and ran up the stairs.

My partner stayed with the first man, while I chased the man wearing the bandana up five flights of stairs to the roof, across several rooftops, then down the stairs of another building to the street. I chased him through the streets, and after two blocks of zigzagging in and out of traffic and almost being hit by several cars, I caught and handcuffed him. As we caught our breath and walked back to the patrol car, he said, "I'm sorry for running."

In court, I charged the defendant with unlawful possession of narcotics and resisting arrest. During the booking process, he told me that he was actually glad to be arrested. He was strung out on heroin and needed help. He hoped that in prison he might get into a program.

At the arraignment, he was held in $500 bail, but he did not have the money and no one from his family would put up the bail for him. Within two weeks, the police laboratory confirmed that the white powder was indeed heroin, and the defendant's legal aid attorney made a motion to suppress the heroin on the grounds that it was seized in violation of the defendant's constitutional rights.

A hearing was held, and on direct examination by the district attorney, I testified to exactly what had happened, or what I thought had happened, and I hoped the defendant would be convicted: first, because he could have caused me to be killed, running across the rooftops and dodging traffic, and, second, because he needed to be incarcerated in order to get help for his drug addiction.

On cross-examination, the defense attorney asked me a series of questions. I testified that I saw the defendant put the Marlboro box on the windowsill. He asked me how he put it there. I said, "I don't know, he just put it there." He asked me how far he was from the windowsill. I said one or two feet. He asked whether he could reach the windowsill by extending his arm. I said yes. He asked whether he threw it to the windowsill. I said, "Not really, he let it go, then ran up the stairs." He asked how many inches were there between his hand when he let the Marlboro box go and the windowsill. I said, "I'm not sure."

The defense attorney did not ask me anything about the chase across the roofs or through the streets to apprehend the defendant, and on redirect testimony the district attorney was precluded from asking anything about the chase.

At the conclusion of the hearing, the judge ruled that the envelopes containing heroin must be suppressed and could not be used as evidence against the defendant. The judge explained that when the defendant put the cigarette box on the windowsill, it did not mean that he had abandoned the box. Legally, it was still in his possession, and I had violated his Fourth Amendment rights against unreasonable search and seizure by picking up the box and looking into it. According to the exclusionary rule, evidence obtained in violation of the Fourth Amendment could not be used in court against a defendant.

At first, I did not understand the ruling. However, when the assistant district attorney explained it, I realized my testimony was responsible for the judge's ruling. Had I testified that the defendant discarded the Marlboro box by throwing it or flipping it three or four inches to the windowsill, his intent to abandon the box would have been clear. In that case, seizing the box would have been constitutional, and the ruling would have been different.

The charges of possession of narcotics and resisting arrest were dismissed and the defendant was released, but I saw his reaction and he did not look overjoyed. Apparently, he had resigned himself to going into the correctional system and hoped someone there would help him.

Over the next few days, I grew angry with myself because, while reconstructing the events in my mind as impartially and as accurately as I could, I realized that clearer testimony would have shown that the defendant had in fact tossed the box several inches. He had not placed it on the windowsill, but had let it fall to the windowsill. He had not placed it on the windowsill in the sense of someone being careful with his possession, but he had let it fall about four or five inches while he turned his head away and moved toward the stairs. Unfortunately, I had not realized the importance of those inches and the physical and spatial movements. I had not realized what the defense attorney had been trying to prove, and I had provided him with the exact answers he needed.

What made me angrier still, and what I was confused about, was the dismissal of the resisting arrest charge. The judge had ruled that since there was no basis or probable cause to seize the heroin, the arrest of the defendant was invalid, and, consequently, the arrest was unauthorized and the defendant could not be convicted of resisting an unauthorized arrest. On the basis of that logic, it would seem that had I fallen off the roof or been hit by a car during the chase, my death or injury would not have been a basis for any charges against the defendant. The ruling seemed wrong to me then, and forty years later, it still seems wrong.

Later, during my police career, as a higher ranking officer in the New York City Police Department Patrol Bureau, Detective Bureau, Organized Crime Control Bureau, and Narcotics Division, I encountered the exclusionary rule in all its forms. I saw its demoralizing effect on young idealistic officers when clearly dangerous and guilty criminals got off because of the rule.

After I retired from the police and began practicing as a criminal defense attorney, I had to invoke the exclusionary rule even when I doubted that it was applicable to the circumstances of the case, otherwise I would have been subject to allegations of malpractice for not zealously representing my client. I saw criminal defendants, refusing to accept blame themselves, shift blame for their crimes to the police for not "getting them right," then switch the blame to their defense attorneys for failing to convince the court to suppress the evidence. In one case, a woman, who was arrested immediately after she bought heroin on a street corner, related that as the police approached her, she dropped the envelope of heroin on the ground and stepped on it to cover it. She complained that when the police made her move from the spot on which she was standing, they saw the envelope of heroin. She believed that they violated her constitutional rights by making her move and she wanted the heroin to be suppressed. Not once did she mention her own guilt, her own debilitating addiction, or the three young children she had left alone at home while she went out to get high.

Our greatest legal minds have debated and disagreed about the exclusionary rule for decades. They have debated fine legal points of whether it is a mandated right inherent in the Fourth Amendment or whether it is an optional remedy that can be modified on a case-by-case basis. They have debated whether Congress can overrule or modify judicial interpretations or whether only the judiciary can do so because of the Constitution's supremacy over legislation. They have debated whether the general deterrence the rule may provide outweighs the costs of the specific injustices it causes.

Simpler, ordinary people, victimized by crime, are not as conflicted. Those involved in cases in which dangerous criminals are freed because of technicalities complain that the system is broken, the cops and the district attorneys do not know what they are doing, and either a fix is in or a bias in the system works against true justice.

Questions need to be answered: After decades of expansion, does the exclusionary rule serve the cause of justice? Does it really deter police from committing constitutional violations? Does it cause corruption? Is it a detriment even to the criminals it releases? How does it affect the war on terrorism? Is it the best means of protecting privacy?

The purpose of this book is to examine the exclusionary rule and its consequences, including the historical development of the rule, its relation to crime rates, police performance, and the loss of confidence in the justice system. Specific cases are examined to illustrate the practical effects of the rule. Assumptions about the rule's deterrent value are scrutinized, and alternative methods of protecting individual rights are proposed.

Contents

The Constable Has Blundered

Chapter One

Unequal Justice

Written above the entrance to the United States Supreme Court are the words, "Equal Justice Under Law." The exclusionary rule subverts that ideal: two criminals who commit the same crime by the same means can receive different and unequal treatment by the criminal justice system, not on the basis of their own conduct, but rather on the basis of police conduct. Furthermore, two crime victims subjected to similar crimes can be treated differently and unequally: one might receive justice while the other might not, solely on the basis of police conduct of which they had no knowledge or responsibility.

The exclusionary rule is the primary means by which courts enforce constitutional restraints on law enforcement. It prohibits the use in a criminal trial of evidence that is obtained by the government in violation of the Bill of Rights, particularly the Fourth, Fifth, and Sixth Amendments of the Constitution. When the police conduct an unlawful arrest, search, or interrogation, the courts will suppress any physical evidence, confession, or information obtained directly from the unlawful conduct. The theory and stated purpose of the suppression remedy is to deter police and other law enforcement agents from committing the same kinds of violations in the future.

Whether the rule has accomplished its stated purpose is the subject of intense debate and many scholarly articles, and while the rule may have produced some positive effects on police conduct, its detrimental effects have far outweighed any benefits. It is not a cost-free remedy. The suppression of evidence can undermine otherwise viable prosecutions and can result in guilty defendants being released and victims of a crime losing their opportunity for justice. Furthermore, in addition to dispensing unequal justice for both defendants and victims, the rule has generated widespread police corruption, greatly increased perjury in our courts, incited animosity toward the police, spread a substantial disrespect for the law, and led to an overall increase in criminality.

In 1961, the United States Supreme Court extended the exclusionary rule for Fourth Amendment violations from federal courts to the courts of all fifty states.[1] Since then, with few exceptions, the rule has grown in application, complexity, and inconsistency. In addition to suppressing evidence to enforce the Fourth Amendment, courts suppress evidence to enforce other clauses in the Bill of Rights. Courts suppress physical objects, confessions, statements, documents, evidence analysis reports, identifications, and even testimony about observations of what an officer saw or heard.

A significant problem with all of this evidence suppression is that sometimes the evidence is suppressed, sometimes it is not, and the determinants are difficult to discern or justify. The criteria for applying suppression are different from court to court: federal courts use different criteria than state courts, and state courts vary from one to another.

Moreover, outcomes are inconsistent and unrelated to fairness or justice; they are often determined by nuances and chance factors. For example, in street encounters, evidence recovered by the police may be suppressed on the basis of how the police approached the suspects; consequently, two criminals who are arrested for committing the same crime of unlawful possession of a loaded gun might face different and unequal consequences. Were the first criminal to be approached by a police officer who had drawn his firearm, which would be tantamount to a seizure, the criminal might be able to successfully challenge the constitutionality of the seizure and, therefore, demand the suppression of the illegal gun he carried. On the other hand, were the second criminal to be approached by an officer who had not drawn his firearm, the second criminal might be unable to successfully challenge the admissibility of the gun he carried. As a result, the first criminal would either avoid trial entirely or would be acquitted, while the second criminal might have to stand trial and might be convicted.[2] These divergent results occur not on the basis of the defendant's guilt or innocence but on whether the police officers felt it was necessary to take out their guns.

In addition, the rule's application to persons who are subjected to a police search or interrogation can vary depending on their status and situation. For example, two persons in a vehicle subjected to the same improper search by the police may face different and unequal consequences. When the police unreasonably search a vehicle and find an illegal gun, the driver of the vehicle might go free while the passengers might not. This disparity results not from factors of guilt or innocence, but purely because of exclusionary rule technicalities. A driver with a proprietary interest in the vehicle can challenge the constitu-

1. *Mapp v. Ohio*, 367 U.S. 643 (1961).
2. *People v. Moore*, 6 N.Y.3d 496 (2006).

tionality of the search and might succeed in having the evidence excluded from use at his trial, while a passenger without a proprietary interest in the vehicle does not have standing to challenge the constitutionality of the search and thus cannot have the evidence excluded. The United States Supreme Court has held that a passenger does not have an expectation of privacy in the glove compartment, the area under the seat, or the trunk of a vehicle.[3] As a result, in the case of an improper search, a driver, who is more likely to be the actual owner of the gun, will avoid trial for unlawful possession of the gun while the passenger, who is less likely to be the owner of the gun, might have to stand trial and be convicted.

These kinds of results demonstrate the hyper-technicality, inconsistency, and unfairness that the exclusionary rule has wrought on our criminal justice system. Nevertheless, the American public has come to accept the rule as a constitutional imperative. They accept and believe that relevant and material evidence must be kept out of the courtroom to deter the police and the state from conducting unreasonable searches or seizures, and also that voluntary and truthful confessions must be kept out of the courtroom when the police conduct interrogations or questioning without adhering to the technical rules of criminal procedure. Misapplying the rationale for the proof-beyond-a-reasonable-doubt standard for convictions, they accept and believe that it is better that a hundred guilty defendants go free rather than one guilty defendant be convicted based on evidence obtained in violation of his constitutional rights.

Most Americans believe that the exclusionary rule was written in the Bill of Rights and has been the law of the land since the Constitution's ratification. They would be surprised to find that it was not. Contrary to popular belief, the exclusionary rule is not written in the Bill of Rights. The framers neither mentioned nor contemplated the imposition of such a rule. They intended the Bill of Rights as a check on the powers of the newly formed federal government, with no intention of interfering with the states' abilities to enforce local, traditional criminal laws. The Fourth Amendment of the Bill of Rights consists of two distinct clauses:

> 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.

---

3. *Rakas v. Illinois*, 439 U.S. 128 (1978).

Particular remedies for violations of the Fourth Amendment, or any of the other Amendments, were not declared, and for 123 years, from the ratification of the Bill of Rights in 1791 to 1914, the exclusionary rule was essentially nonexistent. In the search-and-seizure context, it was first applied in the federal mail-fraud case of *United States v. Weeks*, 232 U.S. 383 (1914). In that case, a United States marshal entered the defendant's home without a warrant and seized letters and envelopes that were used as evidence to convict the defendant of mail fraud. Before the trial, the defendant filed a *replevin* action for return of his property on the grounds that it was seized illegally. His action was denied and the evidence was used at his trial. He appealed to the United States Supreme Court, and the Court ruled that entry into the home without a warrant was a violation of the Fourth Amendment and, consequently, the evidence obtained should have been returned to the defendant and not used against him at his trial. This was the birth of the exclusionary rule.

Six years later, in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the Supreme Court decided a similar case in which federal agents had seized business records without a warrant. In this case, knowing they would have to return the documents, the agents copied the information from the records, returned the records, and subsequently subpoenaed them for use at the defendant's criminal trial. The Court excluded the use of the subpoenaed records and, as written in the majority opinion by Justice Oliver Wendell Holmes, the knowledge gained by the unlawful seizure of the records "shall not be used at all." This case was a forerunner of the "fruits of the poisonous tree" doctrine, which holds that evidence derived from constitutionally inadmissible evidence is likewise inadmissible. Not only evidence obtained directly from a constitutional violation, but also secondary evidence derived from the information obtained during the violation is tainted and may not be used against the person whose rights were violated.[4]

Both *Weeks* and *Silverthorne* involved personal property and records that citizens lawfully possessed. Neither case involved possession of unlawful contraband, such as narcotics, guns, counterfeit money, or stolen property. Obviously, the Court could not have ordered the return of unlawful contraband: later cases established the procedure that unlawful contraband would be excluded from evidence but not returned to the person from whom it was seized.[5]

The *Weeks* exclusionary remedy and the *Silverthorne* poisonous-tree doctrine were judge-made rules, and were far from universally approved. Neither

---

4. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979).

5. *United States v. Trupiano*, 334 U.S. 699 (1949); *United States v. Jeffers*, 342 U.S. 48 (1951).