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- out 12/27

You have requested an expression of this Division's views on the probable effect of the Supreme Court's decision in Mallory v. United States, 354 U.S. 449, on the power of FBI Agents to make a search of a defendant's premises, with his consent, after arrest and prior to arraignment. You state that it is your concern that the Mallory decision may be construed by the courts as prohibiting all consent searches made between arrest and arraignment.

While one can never forecast what interpretation will be placed upon a decision of the Supreme Court, it does not appear to us that it prohibits all consent searches made between arrest and arraignment. So far as consent searches are concerned, recent decisions, to be discussed hereafter, have construed the Fourth Amendment in a manner which conserves public interests as well as the interests and rights of individual citizens. We do not read the Mallory decision as changing the law in this respect.

In addition to the question involving the confession, the Court of Appeals for the District of Columbia in its decision in the Mallory case (236 F.2d 701), also considered the question whether evidence, obtained through a search made with defendant's consent after his confession, was properly admitted. In urging reversal of his conviction, Mallory's third point was that admission into evidence of articles of clothing seized by the police and worn by him at the time of alleged crime was error. The facts leading to the seizure of this clothing were described by Judge Prettyman, writing for the majority of the Court as follows (236 F.2d at 704):

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7 Immediately after Mallory signed a confession officers questioned him about his clothing. He told them it was in the janitor's apartment, which

7 adjoined the furnace room where the rape occurred. He gave written permission to go to the apartment and get the clothes and accompanied two officers on that errand. The shorts, coat, shirt and trousers bore seminal stains.

Mallory argued that his consent to the search was obtained by duress or coercion. Judge Prettyman rejected this contention. He said (236 F.2d at 704):

10 * * * moreover, the consent was an immediate accompaniment to a confession of the crime and derives color from the confession. In 7 Judd and Nelson no confession was involved. Here, since Mallory had already confessed to the crime itself, in the absence of evidence to the contrary his express consent to the taking of specific property involved in the crime must be treated as being of the same voluntary nature. We find no error in this respect.

This issue was presented in the briefs before the Supreme Court and on oral argument. However, in reversing the Court below, the Supreme Court did not have to reach or consider this point in its decision, and did not do so. Having found that the accused was not taken before a committing magistrate "without unnecessary delay" in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, there was no need to consider Mallory's other point that the search was unlawful. The Court in a unanimous decision said (345 U.S. 449 at 455):

10 We cannot sanction this extended delay, 7 resulting in confession, without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard. In every case where the police resort to interrogation of an arrested person and secure a confession, they may well claim, and quite sincerely, that they were merely trying to check on the information given by him. Against such a claim and the evil potentialities of the practice for which it is urged stands Rule 5(a) as a barrier.

In reaching its decision, the Court adverted to the important reasons of policy behind Rule 5(a) of the Federal Rules of Criminal Procedure and similar predecessor statutes, as these reasons were expounded in McNabb v. United States, 318 U.S. 332. In the latter case, the Court said (Id. 343-344):

10 For this procedural requirement checks resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.

As noted above, the Court was concerned in its opinion solely with whether the arraignment following arrest was held "without unnecessary delay". It concluded that "the circumstances of this case preclude a holding that arraignment 'was without unnecessary delay'" (Emphasis added (354 U.S. at 455)). It did not expressly or impliedly deal with the third point considered by the Court of Appeals.

For various reasons, we do not think the holding of the Court may be extended to include a prohibition against all freely consented searches made between arrest and arraignment.

1. Under familiar rules, the Supreme Court decides nothing beyond what is necessary to the judgment to be rendered (See e.g. United States v. Joseph, 94 U.S. 614). Once a case is shown to have a fatal defect requiring reversal, the Court will generally refrain from considering other points which are unnecessary to the final determination of the case. This it obviously did in the Mallory case. As the Court recently said in Greenwood v. United States, 350 U.S. 366, 376:

10 We decide no more than the situation before us presents and equally do not imply an opinion on situations not now before us.

We think that this principle is implicit in the Court's decision in the Mallory case.

2. Earlier in its decision, the Court was careful to point out that "the duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience". In this connection, the Court added (354 U.S. at 455):

10 Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession.

By the same token, circumstances may justify a search with the voluntary consent of the prisoner, after arrest and prior to arraignment, where prompt action taken by the FBI with the consent of the prisoner may turn up information that will verify that he is the one who has committed the crime. We do not think that the Supreme Court's decision may be construed as prohibiting such a search, or of overriding existing decisions which permit it under these circumstances.

3. If consent is obtained freely and without duress or coercion, we think that the case will be governed by United States v. Mitchell, 322 U.S. 65, rehearing denied 322 U.S. 770.

In that case, the facts were that within a few minutes of his arrival at the police station, Mitchell admitted guilt, told the officers of various items of stolen property to be found in his home and consented to their going to his home to recover the property. Before the Supreme Court, Mitchell relied on the McNabb case in support of his contention that the stolen property was inadmissible to support a conviction. Rejecting this contention as unsound, Mr. Justice Frankfurter speaking for the Court declared that "the foundations for application of the McNabb doctrine are here totally lacking" (322 U.S. at 69). He drew these distinctions between the Mitchell and McNabb cases (Id. at 69, 70):

10 * * *. Unlike the situation in other countries, see, for instance §§ 25 and 26 of the Indian Evidence Act, 1872, under the prevailing American criminal procedure, as was pointed out in the McNabb case, "The mere fact that a confession was made while in the custody of the police does not render it inadmissible." 318 U.S. at 346. Under the circumstances of this case, the trial courts were quite right in admitting, for the juries' judgment, the testimony relating to Mitchell's oral confessions as well as the property recovered as a result of his consent to a search of his home. * * *

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10 * * *. Obviously the circumstances of disclosure by Mitchell are wholly different from those which brought about the disclosures by the McNabbs. Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights, but instead the consent to a search of his home, the prompt acknowledgement by an accused of his guilt, and the subsequent rueing apparently of such spontaneous cooperation and concession of guilt.

In the Mitchell case, it was not until eight days after his admission of guilt and consent to search that he was arraigned before a committing magistrate. The Court agreed that his detention during this period was illegal, but this illegality, the Court said (322 U.S. at 70):

10 does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers.

The Mitchell decision was followed by the Court of Appeals for the District of Columbia in Brainard v. United States, 220 F.2d 384 (D.C. Cir.).

In that case, several hours after the defendant was arrested, her living quarters were searched with her consent, obtained freely and without coercion or duress. Her consent was shown, not only by the testimony of the police officer, but by that of a disinterested witness, who was present at the time the consent was given. Upon appeal the defendant claimed the trial court erred in denying motions to suppress the evidence seized during the search. In affirming the conviction, the Court in a per curiam decision said (220 F.2d at 385):

10 * * *. We believe, therefore, that the case is governed by United States v. Mitchell, 322 U.S. 65, 64 S.Ct. 896, 88 L.Ed. 1140, rehearing denied 322 U.S. 770, 64 S.Ct. 1257, 88 L.Ed. 1595, and that our ruling in this case is in compliance with the standards established in Judd v. United States, 89 U.S. App. D.C. 64, 190 F.2d 649, and in Higgins v. United States, 93 U.S. App. D.C. 340, 209 F.2d 819.

The Mitchell decision has never been overruled. It was not questioned in the Mallory case. In our opinion, it is still controlling.

The distinction drawn in the Mitchell case for holding the McNabb decision inapplicable where voluntary consent is given to a search, is of particular significance here. It will be noted that McNabb, as did Mallory, involved a disclosure or confession which the Court held was induced by illegal detention. But if a search is involved, and consent to it is not obtained through illegal methods, through duress or coercion, express or implied, Mallory like McNabb does not apply; it is the principle expressed in the Mitchell decision which governs.

It must also be remembered in this connection, that Mr. Justice Frankfurter wrote both the Mitchell and Mallory decisions for the Court. It would seem most unlikely, to say the least, that the learned Justice would intend to overrule one of his own landmark decisions, without express language making his intention clear beyond a shadow of a doubt.

Judd v. United States, 190 F.2d 649 (D.C. Cir.), a leading case in the Court of Appeals for the District of Columbia, does not express any rule contrary to the Mitchell case (See, Brainard v. United States, 220 F.2d 384, 385 (D.C. Cir.)).

In the Judd case, the Court of Appeals merely found that under the circumstances of the case, the Government had failed to establish the heavy burden upon it of proving by "clear and positive testimony" that there was "no duress or coercion, actual or implied" in obtaining consent to the search. In an opinion for the majority of the Court, Judge Washington set forth in detail certain general principles and illustrations which may be of interest. He said (190 F.2d at 650-651):

10 Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654; United States v. Kelih, D.C. S.D. Ill. 1921, 272 F.484. The Government must show a consent that is "un-equivocal and specific" (Karwicki v. United States, 4 Cir., 55 F.2d 225, 226), "freely and intelligently given." Kovach v. United States, 6 Cir. 53 F.2d 639. Thus "invitations" to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. United States v. Marquette, D.C. N.D. Cal. 1920, 271 F. 120. A like view has been taken where an officer displays his badge and declares that he has come to make a search (United States v. Slusser, D.C.S.D. Ohio 1921, 270 F. 818), even where the householder replies "All Right." United States v. Marra, D.C. W.D.N.Y. 1930, 40 F.2d 271. A finding of consent in such circumstances has been held to be "unfounded in reason". Herter v. United States, 9 Cir., 27 F.2d 521. Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent.

10 This burden on the Government is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found. United States v. Novero, D.C., 58 F. Supp. 275; United States v. McCunn, D.C. S.D.N.Y. 1930, 40 F.2d 295. In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent "not in accordance with human experience", and explainable only on the basis of "physical or moral compulsion". Ray v. United States, 5 Cir., 84 F.2d 654, 656.

There are numerous other cases where the courts have held that consent to a search must be freely and intelligently given, and that the circumstances surrounding any consent given by an individual under arrest will be scrutinized carefully to assure that duress or coercion has not been practiced. See, Nelson v. United States, 208 F.2d 505 (D.C. Cir.); Higgins v. United States, 209 F.2d 819 (D.C. Cir.); United States v. Arrington, 215 F.2d 630 (7 Cir.); Waldron v. United States, 219 F.2d 37 (D.C. Cir.); United States v. Reckis, 119 F.Supp. 687 (D.C. Mass.); United States v. Lerner, 100 F.Supp. 765 (N.D. Cal. S.D.); United States v. Alberti, 120 F.Supp. 171 (S.D. N.Y.); United States v. Busby, 126 F.Supp. 845 (D.C.D.C.).

But none of these cases, nor the Mallory case, holds that a search conducted with the free and uncoerced consent of the individual, after arrest and prior to arraignment, is forbidden.