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CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. 593.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

No. 594.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

REPLY BRIEF OF PETITIONER.

THE PROTECTION OF THE CONSTITUTION AGAINST UNLAWFUL SEARCH AND SEIZURE WAS PROPERLY INVOKED IN THE STATE COURTS.

It is asserted by the Attorney General of Colorado that petitioner did not claim the protection of the fourteenth amendment except by supplemental assignments of error. He admits, however, that in both the district court and the state supreme court petitioner invoked the protection of the fourth amendment to the constitution on the ground that

there was an unreasonable search and seizure of petitioner's books and records.

It is our position that the protection of the fourth amendment is made effective against state action by the fourteenth amendment. If that be correct—and that is the only question in the case—then petitioner adequately asserted his constitutional defense by invoking the fourth amendment. Prior to the adoption of the fourteenth amendment, the fourth amendment only applied to action by the federal government; but after the adoption of the fourteenth amendment, the right of privacy was guaranteed against both federal and state action.

The constitutional immunity against search and seizure is of the utmost importance. Constitutional rights cannot be frittered away by such an attenuated procedural objection that the wrong amendment was designated. It is customarily and properly said that the right of free speech is protected by the first amendment. This is another way of saying that the first amendment has been made effective against state action by virtue of the fourteenth amendment. And it is just as proper to say that the fourth amendment, by virtue of the fourteenth amendment, protects the individual against unreasonable search and seizure by state officials.

It is admitted by the Attorney General that before the argument in the state supreme court a supplemental assignment was filed specifically setting up the fourteenth amendment. The Attorney General says that the Supreme Court denied petitioner's motion to file such supplemental assignment because it came too late to be considered by the appellate court (Page 40 of respondent's brief). The record does not show that the court gave any reasons for denying petitioner the right to file supplemental assignments of error. The only things that the record shows are the objections of the Attorney General (R. 66; Case No. 594). The basis of the objections was that the question which was sought to be raised in the supplemental assignment of error had already been raised in the original assignment of error. The original assignment had invoked the protection of the fourth amendment. It is inconsistent for the Attorney General to tell this court that the assignments came too late

when it appears from the record that the only objection that was made by the Attorney General to such assignments was that they had already been covered.

The fact that the Colorado court did not refer to the federal constitution in its opinion does not affect the jurisdiction of this court. In the case of *Bob-Lo Excursion Co. v. People of State of Michigan,* decided February 2, 1948, and reported in 68 S. Ct. 358, Advance Sheet No. 6, under date of February 15, 1948, in the footnote on page 361, this court said:

> "The Michigan Supreme Court did not refer explicitly in its opinion to appellant's Fourteenth Amendment contentions, but the record shows they were presented to that court in the assignments of error on appeal and were therefore necessarily rejected by its affirmance of the judgment of the Recorder's Court."

In the case of *Musser v. State of Utah,* decided by this court on February 9, 1948, reported in 68 S. Ct. 397, this court stated:

> "On argument in this court, inquiries from the bench suggested a federal question which had not been specifically assigned by defendants in this court, nor in any court below, although general transgression of the Fourteenth Amendment had been alleged."

Since the court was concerned with whether or not the fourteenth amendment was violated, the court vacated the judgment and remanded the case to the state court so that the matter could be clarified.

THE UNLAWFUL SEARCH AND SEIZURE OF PETITIONER'S BOOKS CANNOT BE JUSTIFIED AS AN INCIDENT TO A LAWFUL ARREST.

It is admitted by the respondent that there was no search warrant or other order of court upon which the search and seizure could be justified. Now, it is sought to justify the seizure because of the lawful arrest. That question, while raised in the state court, was not considered or decided by it. Further, the search and seizure was exploratory and general

as pointed out in the original brief. A lawful arrest does not justify an unlawful search or seizure. See *Olmstead v. United States*, 277 U. S. 438, 464; *Boyd v. United States*, 116 U. S. 616, 641;; *Takahashi v. United States*, 143 F. (2d) 118, 123 (C. C. A. 9th), and *Agnello v. United States*, 269 U. S. 20.

In *Johnson v. United States*, decided Dec. 18, 1947, 68 S. Ct. 367, 369, this Court said:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search 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. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

It has been settled by the decisions of this Court that the only things that may be seized incident to a lawful arrest are contraband articles which it is unlawful to possess or the instruments, tools, or fruits of crime. See *Harris v. United States*, —— U. S. ——, 67 S. Ct. 1098, and *Lefkowitz v. United States*, 285 U. S. 452.

It is also suggested in respondent's brief that the officers did not make any unlawful search because the books were on the doctor's desk in plain view. The answer to this contention is that the citizen does not lose his right to privacy or his immunity from police surveillance because he does not keep his personal books and records under lock and key.

> "The effective enforcement of a well designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy."
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> *Feldman v. United States,* 322 U. S. 487, 489, 490; 64 S. Ct. 1082, 1083.

Respondent cites numerous cases in which a search and seizure was upheld as incident to a lawful arrest, but an examination of those cases will disclose that the thing seized was contraband, or the fruits or means of crime.

The decision of the Colorado Supreme Court in this case is not based upon the question of lawful or unlawful arrest. The Colorado Court in the original Massantonio case, 77 Colo. 392; 236 P. 1019 upon which the present decision rests, recognizes that there is a division in the authorities, and that the federal rule is different from the state rule. The clear implication of the decision is that under the federal rule this search and seizure would be unconstitutional. Indeed, the Colorado Court does not hold expressly or by implication that the search and seizure in this case was constitutional. On the contrary, it expressly and severely condemns such search and seizure.

> "Every officer making an Unconstitutional search, and every officer advising or conniving at such conduct

is a law violator and a violator of his oath of office and should be held to accountability."

Massantonio v. People, 77 Colo. 392; 400; 236 P. 1019.

The Attorney General does not discuss the cases which we have cited in our opening brief to the point that immunity from search and seizure is a basic right in a free society; that the citizen is entitled to protection against the surveillance of police officers; that in a free government there is an inviolate right to privacy; that if officers of the law have the right to make general and explorary searches and seizures, there can be no ordered liberty or civilized government, or as expressed by Mr. Justice Jackson in *Johnson v. United States, supra,* that abritrary search and seizure "would obliterate one of the most fundamental distinctions between our form of government where officers are under the law, and the police-state where they are the law." (Pages 370-371 of 68 Ct.)

The argument of the Attorney General is wholly out of line with the decision of the Colorado court. The Attorney General argues that the search and seizure was reasonable. The Colorado court definitely holds to the contrary. The Colorado court would remit the persons whose fundamental rights have been violated to independent court action, but it is submitted that the practice of a police state, which is wholly contrary to the spirit of American freedom, can only be successfully stopped if the courts shut the door to evidence unconstitutionally obtained. The police officers will continue to violate the Constitution as long as courts receive evidence obtained in violation of constitutional rights.

Respectfully submitted,

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