2010

Justice Carter's Dissent in People v. Gonzales: Protecting Against the "Tyranny of Totalitarianism"

Rachel A. Van Cleave
Golden Gate University School of Law, rvancleave@ggu.edu

The Great Dissents of the "Lone Dissenter"

Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme Court

Edited by

David B. Oppenheimer

Allan Brotsky

Contributions by

Jessica L. Beeler • Michele Benedetto Neitz
Justice William J. Brennan, Jr. • Justice Jesse W. Carter
Helen Y. Chang • Markita D. Cooper • Janet Fischer
Judge William A. Fletcher • Marc H. Greenberg
Justice Joseph R. Grodin • J. Edward Johnson • Janice Kosel
Cliff Rechtschaffen • Susan Rutberg • Marci Seville
Marc Stickgold • Rachel A. Van Cleave • Frederic White
Michael A. Zamperini • David Zizmor

Library of Congress Cataloging-in-Publication Data

Carter, Jesse W., 1888-1959.
The great dissents of the "lone dissenter" : Justice Jesse W. Carter's twenty tumultuous years on the California Supreme Court / [edited by] David B. Oppenheimer, Allan Brotsky.
p. cm.
ISBN 978-1-59460-810-0 (alk. paper)
1. Carter, Jesse W., 1888-1959. 2. Dissenting opinions--California. I. Oppenheimer, David Benjamin. II. Brotsky, Allan. III. Title.

KF213.C37O67 2010
347.794'035092--dc22

2010004174

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

Justice Carter's Dissent in *People v. Gonzales*: Protecting Against the "Tyranny of Totalitarianism"

*By Rachel A. Van Cleave**

Introduction

People v. Gonzales[1] involved an issue that continues to divide lawyers, judges, scholars, politicians, as well as the general public: how best to protect individuals from law enforcement conduct that violates constitutional protections? This question is particularly controversial in the context of a criminal case, since the exclusion of illegally obtained evidence often results in the alleged criminal going free. In *Gonzales*, the California Supreme Court was asked to adopt the exclusionary rule as a remedy for violations of constitutional rights.[2] A majority of California Supreme Court justices answered this in the negative. Justice Carter disagreed, and his analysis provided an initial spark to the modern state constitutional law movement in California, as well as a strong caution against allowing government officials to ignore the law with impunity.

Secundo Valenzano notified police that he had met with two men, Gonzales and Chierotti, who showed him a machine that reproduced currency using real currency. Gonzales and Chierotti encouraged Valenzano to bring several thousand dollars to them to double his money with the machine. Subsequently, two police officers entered Chierotti's apartment when he was not home and took a black case that contained the currency-producing machine and bottles

* Associate Dean for Academic Affairs and Professor of Law, Golden Gate University School of Law.

1. *People v. Gonzales*, 20 Cal. 2d 165 (1942).
2. *Id.*

of chemicals. The officers did not have a warrant, nor did they have any other authority to enter Chierotti's home. Both Gonzales and Chierotti objected to the admission at trial of this evidence as well as to the testimony of the officers about what they found in Chierotti's apartment. The trial court admitted the evidence and the testimony and the jury convicted Gonzales and Chierotti.

On appeal, the two defendants argued that the police officers had violated both the United States Constitution as well as the California Constitution, by entering and searching Chierotti's home and seizing the black case and its contents. There was no question that the conduct of the police officers was illegal. Furthermore, there was no doubt that if the police had been federal officers, the decision of the United States Supreme Court in *Weeks v. United States* would have required exclusion of the illegally obtained evidence.[3] However, as of the time of *Gonzales*, the United States Supreme Court had determined that not all of the protections in the Bill of Rights of the Federal Constitution were binding on the states. Indeed, twenty years earlier, California had rejected the exclusionary rule for illegally obtained evidence.[4] Although the majority in *Gonzales* acknowledged that the provision in the California Constitution protecting "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures"[5] is nearly identical to the Fourth Amendment of the United States Constitution, the court nonetheless held that the California Constitution did not require the Court to adopt the exclusionary rule. The majority, instead, focused its analysis on an interpretation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, and concluded that the exclusionary rule was not required to preserve fundamental fairness.[6]

In his dissent, Justice Carter explicitly eschewed any analysis of the Federal Constitution and instead focused exclusively on whether the state Constitution "compels the rule that evidence obtained in contravention thereof shall not be competent or admissible."[7] Justice Carter's primary concern was that the majority's failure to adopt the exclusionary rule would diminish the significance of rights that were designed to protect the "life, liberty and property of the people."[8] His opinion also recognized that these constitutional protections are not simply for those who engage in criminal activity, but also for law-abiding people who might

3. *Weeks v. U.S.*, 232 U.S. 383 (1914).
4. *People v. Mayen*, 188 Cal. 237 (1922).
5. Cal. Const. art. I, §19.
6. *See Gonzales*, 20 Cal. 2d at 165.
7. *Id.* at 175 (Carter, J., dissenting).
8. *Id.* at 177.

suffer when law enforcement authorities abuse their authority. The second-to-last paragraph of Justice Carter's dissent makes poignant reference to the "tyranny of totalitarianism" in other parts of the world and the need to resist any abrogation of constitutional rights to preserve our constitutional form of government.[9]

DISSENT

Carter, J. I dissent.

The rule followed by the majority opinion seriously impairs the efficacy and sanctity of the constitutional guarantee against unlawful searches and seizures. (citation omitted). The particular issue is the [admissibility] of evidence in a criminal proceeding which has been obtained from defendant in violation of that constitutional prohibition. Although it is my opinion that the same constitutional guarantee appearing in the Fourth Amendment to the Constitution of the United States is applicable to states as well as federal agencies because it is one of the fundamental liberties embraced in the Fourteenth Amendment to the Constitution of the United States, I will limit my discussion to the proposition that even if the right to be secure against unlawful searches and seizures is not protected by the federal Constitution with reference to state agencies, the provision in *our state Constitution compels the rule that evidence obtained in contravention thereof shall not be competent or admissible* (emphasis added).

It cannot be seriously questioned that to permit the use of evidence obtained in violation of the constitutional provision at least to some extent infringes upon the field of liberty secured by the inhibition against unlawful searches and seizures. But it goes beyond a mere partial invasion. It in effect practically destroys the right. That is true for the reason that the value of any right varies in direct proportion to the means afforded for the protection of the right; the realization of any benefit from the right is wholly dependent upon the existence of instruments for that purpose. If it may be violated and the fruits of the violation directed against the possessor of it, the fruits of it are lost, and it is no more than a bare abstraction.

I take it that a person in preserving the right here involved is justified in committing homicide. However, if he does not adopt that extreme measure, and in a well ordered social system that should be discouraged, he is faced with [the] possibility that evidence obtained may be used against him. Certainly he should be given credit and security rather than being penalized for failing to pursue such an extreme course.

---

9. *Id.*

Permitting such evidence to be used is an invitation and encouragement to law enforcing officials to violate the Constitution. It gives them free rein to act upon mere suspicion and conjecture, to the harassment of the persons offended and to the end that the sanctity of his home or depository of his papers and effects is destroyed. It is of small comfort to say that he has an action against the officers. In most instances the amount of recovery would be negligible and the process costly.…

Obviously, the purpose and object of the constitutional provision in question was to guarantee security to the individual against invasion of his premises by officers seeking evidence which might be used by them in a criminal prosecution without making oath or affirmation particularly describing the place to be searched or the person or thing to be seized. In other words, it was contemplated by the framers of the Constitution that before an officer should be permitted to secure evidence by means of a search and seizure, the facts supporting the claim of right to make the search should be submitted to a magistrate in the form of an affidavit, and if the magistrate determined such facts to be sufficient he would issue a warrant authorizing the search of premises particularly described in the warrant and the seizure of the person or thing particularly described therein. To say that to permit the use of evidence acquired in violation of this constitutional provision does not abrogate or destroy the constitutional right so guaranteed is to my mind counterfeit logic.

History reveals many abuses by public officers both in England and colonial times in this country when officers invaded the premises of persons suspected of crimes, many of which have long since been abolished, and the papers and effects of innocent victims seized and used for the persecution as well as prosecution of such victims. It was to prevent these abuses that the Fourth Amendment was added to the Constitution of the United States and section 19 of article I was incorporated in the Constitution of California. In my opinion there is no such urgency or necessity enjoined upon prosecuting officers today to obtain evidence of law violation which requires them to violate a constitutional provision so specific in its prohibitions, and which has enshrined within its provisions such sacred concepts of liberty, security and justice as the constitutional provision here in question.

The more I read and hear about the tyranny of totalitarianism as it pervades a large part of the world today, the more appreciative I am of the constitutional form of government and the constitutional guarantees which we have in this country and in this state. And every time I see an effort being made to abrogate or nullify by interpretation any of the constitutional provisions designed to protect the life, liberty and property of the people, I shudder to contemplate what will happen if this disposition to abrogate and nullify these

constitutional provisions continues. I, for one, shall never yield to the doctrine that a constitutional provision designed to protect the life, liberty and property of the people of this country should be abrogated or nullified by interpretation. If political, social or economic conditions require changes in our Constitution, such changes should be made by amending the Constitution in the manner prescribed by it, but it is not for the courts by their decisions to abrogate or nullify constitutional provisions by interpretation or read into those provisions that which was never intended to be included therein.

In my opinion it was prejudicial error requiring a reversal of the judgment for the trial court to admit the evidence obtained by the police officers as the result of the unlawful entry and search of the premises occupied by the defendants, and the judgment of conviction against them should therefore be reversed.

Comment

The two salient points of Justice Carter's dissenting opinion in *Gonzales* involve his reliance on the state constitution as a source of law and his fear of unchecked law enforcement powers. Both concerns prevailed in a subsequent decision by the California Supreme Court.

Thirteen years after *Gonzales*, the California Supreme Court adopted Justice Carter's position in *People v. Cahan*,[10] in an opinion written by Justice Traynor, who had written the majority opinion in *Gonzales*. In a four-to-three decision, the court evaluated the policy arguments involved and concluded that the California Constitution required the exclusion of evidence illegally obtained, and overruled *People v. Gonzales*. During the intervening thirteen years, the United States Supreme Court had held that the protections of the Fourth Amendment against unreasonable searches and seizures applied to the states.[11] However, until the 1961 decision of *Mapp v. Ohio*, the United States Supreme Court did not require states to exclude evidence obtained in violation of these protections.[12]

Justice Carter's dissent in *Gonzales* relied specifically on the California Constitution in concluding that the exclusionary rule was necessary to protect constitutional rights. Thus, his dissent was the precursor to the court's decision in

10. *People v. Cahan*, 44 Cal. 2d 434 (1955) (Justice Carter was still on the California Supreme Court and joined the majority opinion).

11. *Wolf v. Colo.*, 338 U.S. 25 (1949).

12. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Cahan, and the United States Supreme Court's decision in *Mapp*. The *Cahan* decision was the first of many decisions by the California Supreme Court focusing on the meaning of the state constitution as a document independent from the Federal Constitution. Indeed, only twenty-two years after *Cahan*, California was described as having led "the nation in the development of independent interpretation" of state constitutions.[13]

Many decisions of the California Supreme Court interpreted the state constitution in ways that presaged decisions of the United States Supreme Court and often afforded broader constitutional protections to people living in California. For example, in the same year the court decided *Cahan*, the California Supreme Court held in *People v. Martin* that the state constitution permitted a defendant to object to the admission of evidence obtained in violation of another person's rights.[14] The United States Supreme Court had previously rejected the so-called vicarious exclusionary rule in *Goldstein v. United States*.[15] In *Cardenas v. Superior Court*,[16] the California Supreme Court interpreted the state constitutional protection against double jeopardy, predating the United States Supreme Court decision finding that this protection in the Federal Constitution applied to the states.[17]

Beyond criminal procedure rights, the California Supreme Court held unconstitutional statutes that prohibited "mixed-race" marriages,[18] and recognized the right to possess obscene materials in the privacy of one's home,[19] as well as a woman's right to terminate a pregnancy.[20] These decisions, a few of many, each preceded similar decisions by the United States Supreme Court.[21] Justice Carter's dissent in *Gonzales*, as later adopted in *Cahan*, helped to fuel state court interest in state constitutions.

Justice Carter also expressed concern that abrogating constitutional provisions intended to protect life, liberty, and property would put the country on a path that he "shudder[ed] to contemplate," and put our constitutional form

---

13. Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297, 301 (1977).

14. *People v. Martin*, 290 P. 2d 855 (1955).

15. *Goldstein v. U.S.*, 316 U.S. 114 (1941).

16. *Cardenas v. Super. Ct.*, 363 P. 2d 889 (1961).

17. *Benton v. Md.*, 395 U.S. 784 (1969).

18. *Perez v. Lippold*, 198 P. 2d 17 (1948).

19. *In re Klor*, 415 P. 2d 791 (1966).

20. *People v. Belous*, 458 P. 2d 194 (1969).

21. *Loving v. V.A.*, 388 U.S. 1 (1967) (invalidating miscegenation statutes); *Stanley v. G.A.*, 394 U.S. 557 (1969) (recognizing right to possess obscene materials in one's home); *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating a statute criminalizing voluntary abortions).

of government at risk. The anxiety that Justice Carter articulated serves as an appropriate reminder even today. At the time of the writing of this comment, the United States is embroiled in a dispute over the widespread practice of illegal wiretapping engaged in by the Federal Government.[22] In *People v. Cahan,* Justice Traynor echoed Justice Carter's concern about the consequences of not protecting constitutional rights. Pointing to the importance of the rule of law, the majority stated "[i]t is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law."[23] The *Cahan* majority also stated "[t]oday one of the foremost public concerns is the police state, and recent history has demonstrated all too clearly how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights."[24]

22. James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts,* 12/16/05 NYT A1 2005 WLNR 20281359.

23. See *Cahan,* 44 Cal. 2d at 446.

24. *Id.* at 447.