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UNDERWOOD V. STATE: GEORGIA'S HIGH WATER MARK IN THE PROTECTION OF THE BASIC RIGHTS OF CRIMINAL SUSPECTS

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Seventy years ago the Georgia Court of Appeals decided the case of *Underwood v. State*, 13 Ga. App. 206, 78 S. E. 1103 (1913). The facts of the *Underwood* case were dramatic but simple. Suspecting that the defendant Underwood was selling liquor in violation of the state's prohibition law, Americus police went to Underwood's store and illegally searched the premises without a warrant; they arrested Underwood and took him to the police barracks illegally and without a warrant; they forcibly and against his will seized certain keys from Underwood's person; and they then returned to the store where using the keys they opened Underwood's safe and found 114 pints of whiskey. Thereafter Underwood was tried and convicted, the principal evidence against him consisting of police testimony as to the finding of the liquor in the defendant's safe in his store. The holding in *Underwood* was simple. The Court of Appeals unanimously reversed the conviction on the grounds that the illegality of the arrest rendered the evidence obtained thereby inadmissible under the state constitutional self-incrimination privilege.

Before explaining why is the best and brightest of all Georgia criminal procedure cases, however, it may be helpful first to relate the context and some of the interesting circumstances surrounding the case.

First, *Underwood* was decided at a time when prosecutorial and police respect for constitutional rights was even worse than it is now. In 1913 prosecutors and police frequently failed to pay even lip service to due process principles, and dragnet arrests, third-degree methods to obtain confessions, and other abusive practices were entrenched, routine investigative procedures in criminal prosecutions. Thus, *Underwood* was decided at a time when the unconstitutional features of administering criminal justice seemed unalterable and permanent. In addition, the *Underwood* case

was decided August 15, 1913, that is, almost simultaneously with the well-publicized and tragic trial of Leo Frank in Atlanta. Thus, *Underwood* seems in part to have represented a stern rebuke by Georgia's appellate judges of the sorry state of Georgia criminal justice then in operation.

Third, *Underwood* was the most significant but nonetheless only one of a whole string of search and seizure decisions handed down during the first decade of the Georgia Court of Appeals (1907-1916) in apparent defiance of binding precedents decided by the Georgia Supreme Court. See generally Wilkes, "*A Most Deplorable Paradox*": *Admitting Illegally Obtained Evidence in Georgia--Past, Present, and Future*, 11 Ga. L. Rev. 105, 110-25 (1976).

Third, *Underwood* involved one of two search and seizure exclusionary rules created long before *Mapp v. Ohio*, 367 U. S. 643 (1961), extended the Fourth Amendment exclusionary rule to the states. Georgia was, of course, one of the 24 states where illegally seized evidence was generally admissible at the time of the *Mapp* decision. See *Elkins v. United States*, 364 U. S. 206, 224-32 (1960). But long prior to *Mapp* the Georgia courts fashioned two rules for excluding illegally seized evidence under certain circumstances. The first state exclusionary rule originated in *Evans v. State*, 106 Ga. 519, 32 S. E. 659 (1899). Under *Evans* and its progeny evidence seized pursuant to an illegal arrest was inadmissible if the defendant, while being arrested or while under arrest, was forced by police to perform some affirmative act aiding the authorities in seizing the evidence, as where the defendant was forced to hand over the evidence. This exclusionary rule was still in effect in 1961 when *Mapp* was decided and presumably remains good law. See *Grant v. State*, 85 Ga. App. 610, 69 S. E. 2d 889 (1952); see also Wilkes, "*A Most Deplorable Paradox*": *Admitting Illegally Obtained Evidence in Georgia--Past, Present, and Future*, 11 Ga. L. Rev. 105, 133 (1976). The second state exclusionary rule, embodied in *Underwood*, barred the use of evidence obtained by means of an illegal arrest, even though the arrestee was not compelled to perform any affirmative act assisting in the seizure of the evidence. This exclusionary rule was created by the Georgia Court of Appeals in 1907 in seeming disregard of Georgia Supreme Court precedents which did not authorize suppression of seized evidence where the defendant had not been compelled to perform an affirmative act. See *Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66 (1907); *Hughes v. State*, 2 Ga. App. 29, 58 S. E. 390 (1907). This second exclusionary rule no longer exists, having been abolished by the Georgia Supreme Court in 1916. See *Calhoun v. State*, 144 Ga. 679, 87 S. E. 893 (1916). But cf. *Raif v. State*, 109 Ga. App. 354, 136 S. E. 2d 169 (1964). Interestingly, both these state exclusionary rules, although involving illegally seized evidence, rested not on the state constitutional protections against unreasonable searches and seizures, but on the state constitutional self-incrimination privilege.

Turning now to the actual opinion of the court in *Underwood*, what are the reasons why the decision is such a landmark in Georgia? To begin, Chief Judge Hill's opinion is without any doubt the noblest, most sublime, most miltonic apostrophe in favor of constitutional rights ever penned in an American criminal case. Neither Justice Brandeis nor Justice Bradley ever wrote an opinion with passages as eloquent and fervent as those of Chief Judge Hill. Perhaps this why even Wigmore referred to *Underwood* as a "careful opinion by Hill, C. J." 4 J. Wigmore, *Evidence* Â§ 2183 n. 1, p. 628 (2nd ed. 1923). Although this comment may appear only modestly complimentary, in fact it is extraordinary coming from Wigmore, who was so irrationally opposed to search and seizure exclusionary rules that he was willing to distort their history and even to blame the Fourth Amendment exclusionary rule on pro-German and pacifist sentiment during World War I. See Wilkes, *A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth*, 32 Wash. & Lee L. Rev. 881, 896-97 (1975).

Here the key passage of *Underwood*:

The two provisions of the [Georgia] constitution [protecting against unreasonable searches and seizures and compulsory self-incrimination] which we have been discussing appear in the fundamental law of every State of this Union, as well as in the Federal constitution. They are the sacred civil jewels which have come down to us from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security. They are hallowed by the blood of a thousand struggles, and were stored away for safe-keeping in the casket of the constitution. It is infidelity to forget them, it is despotic to trample upon them. They are given as a sacred trust into the keeping of the courts, who should with sleepless vigilance guard these priceless gifts of a free government. We hear and read much of the lawlessness of the people. One of the most dangerous manifestations of this evil is the lawlessness of the ministers of the law. This court fully knows and appreciates the delicate and difficult task of those who are charged with the duty of detecting crime and apprehending criminals, and it will uphold them in the most vigilant legal discharge of all their duties, but it utterly repudiates the doctrine that these duties can not be successfully performed without the use of illegal and despotic measures. It is not true that in the effort

to detect crime and to punish the criminal, "the end justifies the means." This is especially true when the means adopted are violative of the very essence of free government. Neither the liberty of the citizen nor the sanctity of his home should be invaded without legal warrant, suspicion is no substitute a legal warrant, and the badge of authority is the emblem of law and order, and gives right to the wearer to arrest without warrant, imprison without authority, and torture without mercy. Any compulsory discovery of self-incriminating evidence is abhorrent to a proper sense of justice and is intolerable to American manhood. . . . These arbitrary methods of discovering crime are subversive of the fundamental principles of law, destructive of the indefeasible rights of personal liberty, personal security, and private property, and place at the mercy of every petty official and conscienceless criminal the life, liberty, and reputation of the citizen. . . . Therefore courts of justice will not approve such methods to discover crime, and the law, seeking pure and impartial sources of evidence, will refuse to admit compulsory confessions of guilt, and condemns as dangerous, untrustworthy, and without probative value testimony against others obtained by the use of physical torture or mental coercion.

Underwood v. State, 13 Ga. App. 206, 213-14, 78 S. E. 1103, 1106 (1913).

Another reason why the opinion in *Underwood* is so wonderful lies in the philosophy espoused in the opinion, a philosophy which may be pithily phrased as follows: there are some things more important than punishing the guilty, namely, the protection of human rights and dignity. Any system of criminal justice which truly follows this philosophy cannot possibly find itself immured in a morass of police and prosecutorial illegality; but rejection of the philosophy ineluctably leads to torture, the third degree, illegal arrests, illegal searches and seizures, and the like. If Chief Judge Hill's philosophy prevailed, criminal justice here and in other states would not be in its deplorable state and so dependent on "arbitrary methods of discovering crime."

In America's first bill of rights, that of Virginia in 1776, George Mason wrote that freedom and liberty could not survive without a frequent recurrence to fundamental principles, an admonition repeated by T. R. R. Cobb in Georgia's first bill of rights in

1861. Insofar as criminal justice is concerned, no one ever phrased those fundamental principles better than Chief Judge Hill in *Underwood*. Hopefully, therefore, Georgia's criminal defense lawyers will frequently recur to the *Underwood* case.