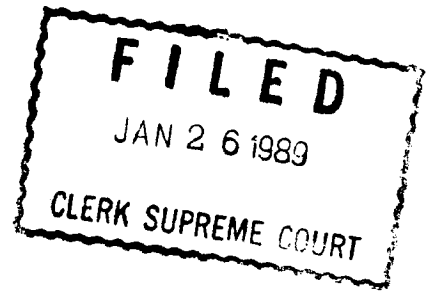


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellant,)
vs.)
DENNIS R. MYER and)
NORMA J. MYER,)
Defendants-Appellees.)

8-502
88-157

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Appeal from the Iowa District Court for Polk County
(No. 37382 & 37383), Harry Perkins, Judge.

The State seeks to reverse a pretrial suppression order which ruled inadmissible all evidence derived from the State's use of the defendants' financial records after the defendants had revoked their consent to examine them.
AFFIRMED.

Thomas J. Miller, Attorney General, and Christie J. Scase and Kevin B. Struve, Assistant Attorneys General, for plaintiff-appellant.

Frank B. Harty and Burns Mossman of Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C., Des Moines, for defendant-appellee Norma J. Myer.

James R. Munroe, Des Moines, for defendant-appellee Dennis R. Myer.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

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This is a discretionary review action brought by the State seeking a reversal of that portion of a pretrial suppression ruling which sustained defendants' motion to suppress evidence and, in addition, a reversal of an order requiring the State to return copies of defendants' books and records. We affirm the trial court.

The significant facts are not in dispute. The tax returns of the defendants for the years 1981 through 1984 were under audit by the Iowa Department of Revenue. The defendants were asked to appear before a staff auditor with the Department and to bring with them relevant financial records. They did appear on August 22, 1985, and brought and delivered to the auditors their books, financial records, and documents used to prepare their tax returns.

On October 15, 1985, the defendants appeared at the Department of Revenue and requested the return of all the financial records they had left with the auditor. The auditor agreed to return the records, but desired additional time to make photocopies. The defendants objected to this and again requested their return. Subsequently, and on the same day, their attorney then requested the return of all the records.

After failing to obtain relief in an injunction action, the defendants, on December 10, 1987, filed this motion to suppress evidence and information obtained through use of

their financial records after October 15, 1985, as well as all evidence derived from an interview with the defendants conducted by the auditor on August 22, 1985. By this date, that is December 10, 1987, criminal proceedings had been instituted against the defendants.

The trial judge sustained the defendants' motion to suppress as to "the evidence obtained by the State by the retention of defendants' books and records after October 15, 1985." In addition, the trial court ordered "the return to the defendants all copies of books and records which were obtained from the defendants." (We note that the original documents were ordered returned to the defendants by the trial court in the injunction action. That action is not on appeal. We also note that the copies were made by the auditor after the defendants requested their return.) This appeal followed.

The central issue to this appeal is whether a person who consents to the search of his personal records can revoke the consent at any time prior to the completion of the search. The trial court held that he could, and we agree.

This then brings us to the search provision of the fourth amendment to the United States Constitution. The State contends the retention and copying of defendants' records did not infringe upon their fourth amendment rights because the defendants, by voluntarily delivering their

records to the auditor, abandoned any reasonable expectation to privacy they may have had in the contents of those records.

The applicability of the fourth amendment depends upon whether "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220, 226 (1979). In Katz v. United States, Justice Harlan suggested that an expectation of privacy is "justifiable if an individual has exhibited a subjective expectation to privacy and the expectation is one that society is prepared to recognize as 'reasonable.'" 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576, 588 (1967) (Harlan, J., concurring).

State v. Van Hoff, 371 N.W.2d 180, 182 (Iowa App. 1985); see State v. Flynn, 360 N.W.2d 762, 764 (Iowa 1985) ("The fourth amendment protects only against the government's intrusion upon a person's legitimate expectation of privacy.").

We concur with the State that a person has no legitimate expectation to privacy in information he voluntarily turns over to third parties. The United States Supreme Court has consistently held in a number of cases. Smith v. Maryland, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 2581-82, 61 L. Ed. 2d 220, 229 (1979). See Couch v. United States, 409 U.S. 322, 335, 93 S. Ct. 611, 635, 34 L. Ed. 2d 548, 558 (1973) ("[T]here can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return.").

The defendants do not necessarily take issue with these principles of law nor their application to the facts of this case. They argue, however, that when government performs a search based upon the consent of a suspect, it must conform its search to that consent. United States v. Ward, 576 F.2d 243 (9th Cir. 1978); Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977). They argue further that if a warrantless search contains no agreement as to duration, it is implicitly limited by the individual's right to withdraw consent. Id. See also Metcalf v. Long, 615 F. Supp. 1108 (D.C. Del. 1985).

The defendants rely heavily on the Ward and Pulliam cases cited above. In Mason v. Pulliam, a taxpayer brought action for the return of books and records voluntarily provided to the Internal Revenue Service. Mason v. Pulliam, 557 F.2d at 428. The district court, and the court of appeals upon review, held that the taxpayer's consent was unilateral and implicitly limited by the taxpayer's right to withdraw his consent and reinvoke his fourth-amendment rights. Id. at 428-29.

The facts of the Mason decision are similar to those of this case. The taxpayer in Mason granted Special Agent Pulliam the right to remove and examine certain of their books and records. Id. at 427-28. Mason's attorney later demanded the return of the records. Id. at 428. The special agent refused and instead copied the records. Id.

The Mason court ordered the return of all of the materials and the copies made subsequent to the demand for the return. Id. The court stated:

When the basis for search or seizure is consent, the government must conform to the limitations placed upon the right granted to search, seize, and retain the papers or effects. Since Mason's action was unilateral and contained no agreement as to duration, it was implicitly limited by Mason's right to withdraw his consent and reinvoke his fourth amendment rights.

Id. at 429.

The other case relied upon by the defense is United States v. Ward, 576 F.2d 243 (9th Cir. 1978). In the Ward case, an IRS agent in the course of investigation went to defendant's home and persuaded him to turn over several boxes of his records. Id. at 244. The defendant's attorney later demanded that the IRS return all of the records. Id. The IRS refused and proceeded to copy the documents which were ultimately returned to the defendant. Id. The defendant was later indicted for income tax evasion, and a motion to suppress evidence resulting from the photocopied documents was filed. Id.

The court granted the motion to suppress, holding that a person who waives his right under the fourth amendment by consenting to a search of his personal records can revoke the consent at any time prior to completion of the search. Id. The United States Court of Appeals relied upon the Mason v. Pulliam decision. Id.

The facts and circumstances in the Ward and Pulliam cases are similar to the facts of this case. Like in Ward and Pulliam, we conclude that from the date the defendants voluntarily delivered the records to the auditor to the time they demanded their return, they abandoned any reasonable expectation of privacy they may have had in the contents of those records. Any information the auditor obtained during this time frame or any copies of the records he made is not subject to the suppression order. This is so for once the defendants consented to the inspection of the records, they frustrated their expectations of privacy and could not claim a violation of their fourth amendment right to privacy.

However, when the basis for a search or seizure is consent, the government must conform to the limitations placed upon the right granted to search or seize or retain the papers or effects. Since the defendants' action was unilateral and contained no agreement as to duration, it was implicitly limited by their right to withdraw their consent and reinvoke their fourth-amendment rights. Thus, any information gathered or copies made after the revocation by the defendants is subject to the suppression order.

This decision controls only the appropriateness of the district court's suppression order denying the State the use of the records after consent had been withdrawn.

We affirm the trial court.

AFFIRMED.