

LIBRARY
SUPREME COURT, U. S.

LIBRARY
RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

In the

APR 2 1 10 PM '73

Supreme Court of the United States

ELMER O. CADY, Warden,

Petitioner,

v.

CHESTER J. DOMBROWSKI,

Respondent.

No. 72-586

Washington, D.C.
March 21, 1973

Pages 1 thru 39

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

----- X
ELMER O. CADY, Warden,

Petitioner,

v.

CHESTER J. DOMBROWSKI,

Respondent.
----- X

No. 72-586

Washington, D. C.

Wednesday, March 21, 1973

The above-entitled matter came on for argument
at 10:11 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LE ROY L. DALTON, Esq., 114 East, State Capitol,
Madison, Wisconsin 53702; for the Petitioner.

WILLIAM J. MULLIGAN, Esq., 108 West Wells Street,
Milwaukee, Wisconsin 53203; for the Respondent.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
LeRoy L. Dalton, Esq., On behalf of the Petitioner	3
In Rebuttal	38
William J. Mulligan, Esq., On behalf of the Respondent	19

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 72-586, Cady against Dombrowski.

Mr. Dalton.

ORAL ARGUMENT OF LE ROY L. DALTON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DALTON: Mr. Chief Justice, and may it please the Court:

This is an action in habeas corpus in which the court of appeals for the Seventh Circuit granted Dombrowski, the respondent, a writ from his imprisonment in Wisconsin for murder unless the state elects to retry Dombrowski. Dombrowski was convicted of murder in 1968 in Fond du Lac County, Wisconsin.

Appeal was taken to the Wisconsin Supreme Court, which affirmed. Then a collateral attack was made on that judgment in the district court in Milwaukee. Habeas corpus was denied. The case went to the Seventh Circuit.

On September 9, 1967, Mr. Dombrowski, who was an off-duty Chicago policeman, drove his 1960 Dodge automobile to his brother's farm near Kewaskum, Wisconsin. That evening the car became disabled and the following afternoon he had it towed to his brother's farm. He left it there and returned to Chicago with his brother that day.

At 12:30 a.m. the following morning--that is

September 11th--he rented a 1967 red Thunderbird at the O'Hare Airport in Chicago. At 10:30 that night, still the 11th, he was involved in an accident near Kewaskum, Wisconsin.

He called the sheriff's department and two officers picked him up from the village of Kewaskum and went to the scene of the accident. He informed them that he was a Chicago police officer.

They found the car off the highway and they called for a wrecker, and Officer Boudry did a cursory inspection of the interior of the vehicle to see if his service revolver was there. It was not.

The vehicle was towed to the garage at Kewaskum where it was parked outside of the garage, and Dombrowski was taken to the sheriff's office in West Bend. He was later charged with drunk driving, became incoherent, was at the hospital being checked by a doctor, unable to communicate with the doctor.

An Officer Weiss, the other officer, who had been on the sheriff's department for five and a half months, decided that in view of the fact that this man was a Chicago police officer, he very likely had that gun somewhere in his vehicle and he should go back and look for it. So, he drove back to the unattended vehicle, opened up the front door, looked in the front end, and found a book of

rules of the Chicago Police Department.

Obviously feeling then that he was on the right track, because if the man carries his rule book he probably has his other paraphernalia of his police officer status, he opened the trunk still looking for the gun. But he found bloody material, including officer's pants, a night stick covered with blood, and a tarp, a floor tarp, from a Dodge automobile saturated with blood.

Q The automobile at this time was at a repair shop, was it?

MR. DALTON: It was outside of a filling station garage in this small town.

Q It had been towed there?

MR. DALTON: It had been towed there and left there outside of the garage by the officers. The officers called the tow operator, and he brought the vehicle there.

Q It had been locked?

MR. DALTON: Yes, it had been locked.

Q And this Officer Weiss, where did he get the key to open it?

MR. DALTON: From Officer Boudry.

Q It had been taken from Dombrowski when he was taken to the hospital?

MR. DALTON: Yes.

Q Had Dombrowski authorized them to take the car

to this place?

MR. DALTON: He was present at the time and made no objection.

Q Why was it taken there at all, just because it was someplace to go for safekeeping or what?

MR. DALTON: It is something that happens all the time in our society now. We are a mobile society and we get in trouble with automobiles. In this case it was disabled. It cannot stay on the highway. It has to go somewhere. And the officers had him in custody; so, they have to take that vehicle--

Q So, this was the official arrangement for the custody of the car?

MR. DALTON: Yes.

Q With the station?

MR. DALTON: This was a standard procedure apparently in this part of the county where the sheriff's office called this wrecker operator and had him tow these cars, disabled cars, to his place until they were properly taken care of some way or other.

Q Was it in the custody of the police?

MR. DALTON: I think so, yes. I think it was their responsibility, especially at that hour of the night.

Q Could they not have secured the car?

MR. DALTON: Pardon?

Q Could they not have secured the car without searching it?

MR. DALTON: I do not think that was--

Q My question was could.

MR. DALTON: They could have--

Q Why not?

MR. DALTON: I suppose they could have taken the car right to West Bend to their police station. I would imagine they could have.

Q Or they could have put it inside the garage.

MR. DALTON: This was a filling station type operation where there is not room inside the--

Q I gather that with Officer Weiss's purpose he would still have searched, even if it had been housed in a garage, would he not?

MR. DALTON: I assume--

Q He was looking for the service revolver, was he?

MR. DALTON: I think he was concerned--and this of course is not in the record because the officer was not cross-examined during any one of the five different proceedings to establish anything other than his intention to preserve that gun for that fellow officer that was under arrest.

Q When was Dombrowski first arrested?

MR. DALTON: When?

Q When.

MR. DALTON: When he was brought to the sheriff's station. That is when they announced that they were charging him with drunk driving.

Q That is before he went to the hospital.

MR. DALTON: Technically I suppose he was under the custody of the officers from the time they took him and took his car to the filling station garage. But he was not charged with a specific offense until they had talked to the district attorney. And then he was charged with drunk driving.

When the officer observed these bloody materials, he picked them out of the trunk. They were still wet. And the tarp especially was saturated with blood. He took these materials back to the sheriff's office and then when Dombrowski was able to communicate, they confronted him, and he asked to talk to an attorney.

The attorney was brought in, conferred with Dombrowski, and later the attorney went to the district attorney, who is in the same area, and advised the district attorney that if they searched the Dombrowski farm, they would find a body.

So, the officers, accompanied by one of the attorneys, an associate of the attorney who had relayed the

message, went to the farm and--

Q I missed where they got the information that if they searched the farm they would find a body.

MR. DALTON: They got this from Dombrowski's lawyer.

Q A local lawyer?

MR. DALTON: Yes. When they had confronted Dombrowski with--

Q With the bloody--

MR. DALTON: --with the bloody materials, he did not want to speak. He wanted to talk to an attorney. And so--

Q So, a local lawyer was provided to him?

MR. DALTON: A local lawyer talked to him and later came out and advised--

Q This is in the hospital?

MR. DALTON: Right, in the hospital. And he advised the county district attorney for Washington County, where West Bend is located, that there would be a body on the Dombrowski farm which is just across the county line in Fond du Lac County.

Q Is Kewaskum in Washington County or Fond du Lac County?

MR. DALTON: In Washington County. The village is. But the farm, the Dombrowski farm, is in Fond du Lac County.

Q Was that a little south?

MR. DALTON: North of Kewaskum and West Bend, south of Fond du Lac. Fond du Lac is at the foot of the lake, as the name indicates, and about a third of the way between Oshkosh and Milwaukee, generally speaking. Justice Rehnquist knows that.

This is the area where Mr. Dombrowski grew up.

When the party arrived at the farm, they realized that they were in Fond du Lac County. So, they contacted the Fond du Lac County authorities as well.

In the afternoon of that day, the dead body of Herbert McKinney was found on a dump on the family farm near a picnic area, which was north of the buildings and the spot where the Dodge vehicle had been parked the day before.

Q And who was the victim? Was he a member of the family?

MR. DALTON: The victim was from Chicago. We have no motive. We were able to prove only that they frequented the same pool hall in Chicago.

Q Is the inference reasonable that the body was in the trunk of the car and carried out to the farm or--

MR. DALTON: I think, reconstructing the crime, that he brought McKinney from Chicago in the Thunderbird because he had rented the car in the middle of the night, and a car matching that description was seen by the Dodge

somewhere around four o'clock to seven o'clock in the morning. The pathologist established the time of death as around seven a.m.

The inside of the Dodge automobile was saturated with blood. One of the socks, which is alleged to be a contaminated piece of evidence, was in the Dodge. The other sock was out by the body near the dump.

I would think the reconstruction would go like this. He took McKinney possibly when he was unconscious out of the Thunderbird, into the back seat of the Dodge, killed him there, shot him, and the pathologist established--and we were able to establish--venue, which is a necessary element in first degree murder in Wisconsin by the pathologist's testimony that he, in his opinion, bled to death in the Dodge automobile. He took the body out of the Dodge automobile, put it in the trunk of the Thunderbird, carried it a few hundred yards over to the dump area, pulled the body out of the trunk, dumped him.

Then at 10:30 that morning, he was seen buying two towels at a store in the village of Kewaskum. A towel answering the description of the towels was among the materials retrieved from the Thunderbird.

When the body was found, one of the investigating officers, the undersheriff for Fond du Lac County, walked over toward the farm buildings and he saw this Dodge

automobile with an Illinois license plate. He looked in the Dodge and he saw it was saturated with blood in the back seat, running over the front of it, I think he described. There was blood on a briefcase, there was blood all over the back seat area, the various upholstery and so on had blood.

It did not take an awful lot of putting together to come to the conclusion that possibly this dead body had been in that car, because there was hardly any blood left in that body. It was laying on the dump with the head down, and the body was white. The pathologist testified later on that this body had pumped practically all of the blood out in an attempt to save the life of the individual. Whenever the body is injured in a vital area, such as the brain or the heart, the rest of the body works and creates terrific pressure to send blood to that emergency area. And so you can imagine that blood was spurting out of this wound every time his heart beat. It did that until there was no more blood to send.

So, they asked for a search warrant. They went to the judge and they said, "We have a body. We have material from a Thunderbird automobile. Among those materials which were blood soaked is a mat from a Dodge automobile, which is saturated with blood. We have the Dodge automobile on the farm. And that in the back seat is saturated with blood. We would like to take that vehicle and search it

for further evidence of this apparent murder."

The judge says, "Yes, you do it. And you impound the vehicle."

Q Did he just say yes or did he issue a search warrant?

MR. DALTON: He issued a search warrant for the vehicle. He also directed them to impound the vehicle, which is in the record.

Q Was not the vehicle already impounded?

MR. DALTON: No, Your Honor.

Q The first one.

MR. DALTON: The first one, but not the Dodge.

Q I thought you said the Thunderbird.

MR. DALTON: The Thunderbird, yes. But the Dodge vehicle--

Q We are now talking about the Dodge?

MR. DALTON: Yes, we are talking about the Dodge that was on the farm. And so the search warrant was issued at 8:15 that evening. This is September in Wisconsin. And, as the record indicates, it was getting dusk when the crime laboratory people arrived from Madison at 7:20. So, you can bet your bottom dollar that at 8:15 it was getting pretty dark.

The search warrant was issued. The undersheriff and the others went to the scene of the crime and got a

tow truck to haul the vehicle into Fond du Lac and the sheriff's garage.

The Seventh Circuit I think made a serious error in finding that the undersheriff had executed the search warrant at the farm when he went out and looked into the Dodge. There was testimony that he opened the door and looked in. I think they questioned him on a motion after the verdict as to whether or not he had searched the vehicle, and he said yes.

No materials were taken out of that vehicle at the farm. And all we have to do is look at the trial record and find out who identified all of these items. In a murder case where you have got a lot of people handling the various items of evidence, you have to have a chain of evidence. The chain of evidence firmly establishes that Mr. Mauer from the crime laboratory was the first man to take anything out of that Dodge, and that was done while the Dodge was impounded in the sheriff's garage in Fond du Lac.

There is a direct quote in the circuit court of appeals' decision that the undersheriff seized the tarp and the sock in the Dodge that evening. That is not true. It cannot be supported by any interpretation of this record.

In fact, the record is so clear that everything was taken out of that Dodge at the time of the search on the morning of the 13th.

Q By whom? Who did that searching?

MR. DALTON: Mr. Mauer from the crime laboratory.

Q This is not the deputy. This is the--

MR. DALTON: Mr. Mauer is an expert who--we have a crime laboratory system in our department of justice. They go out and help local law enforcement people on specialized things. The sheriff called. Sheriffs in small counties are not experts. As we all know from all these search and seizure cases, we are putting too much of a burden on them. But when Mr. Mauer was called, he was told there was a search warrant. And so, since the vehicle was impounded, they waited until the next morning and conducted the thorough search. Because what was the purpose of a search in that vehicle? It was to obtain all of the physical evidence of the crime that was available. And only an expert who knew what to take out of the vehicle could decide that at that time.

Q Mr. Dalton, I am confused about one thing. Is it clear that the Seventh Circuit had the entire state record before it?

MR. DALTON: Yes, Your Honor. When I was preparing the appendix, I contacted the clerk's office in Milwaukee, and for some reason or other there was no entry made in the docket to show that after a stipulation had been entered, the record would not go to Chicago. It did, and

that letter was later on sent to the court and the clerk has it now. So, I apologize for any misleading; it was unintentional and I thought I had checked everything out. I went there personally to see what the record consisted of, and it was later on when Mr. Mulligan was preparing his brief that these records were found, part of them in the Seventh Circuit in the clerk's office and part of them in Milwaukee. But they are here now; all the records are here.

Q What was before the Seventh Circuit?

MR. DALTON: The Seventh Circuit asked for the record to be sent down there several months after the rest of the record went there.

Q Was it there when this case was decided?

MR. DALTON: Yes.

Q How do we know? You said you did not know; you had to go check it.

MR. DALTON: Subsequently the clerk in Milwaukee found a transmittal letter. It was not in this file. Apparently it was misfiled. And the letter was sent to this Court after the record came down. It was added to the record here.

Q Added to the record here. But, I mean, was it added to the record in the court of appeals?

MR. DALTON: Yes. The court of appeals, I am satisfied, had the full record.

Q You are satisfied?

MR. DALTON: Yes.

Q One other question, Mr. Dalton. I take it that all of the items taken from the Dodge were taken within the 48 hours of the issuance of the warrant?

MR. DALTON: Yes. The return on the warrant was made on the 14th. That is another fact that the Seventh Circuit determined that is not supported by the record. They said that the warrant was executed and a return prepared and therefore the warrant was functus officio.

What kind of games are we playing? We cannot even take a vehicle that has been impounded and search it for evidence of murder without--

Q I understood that the decision of the Seventh Circuit turned not on any search. I know they did a lot of talking about the search of the Dodge. I thought what really happened here was that they reversed on the search of the Ford.

MR. DALTON: On both of them, Your Honor.

Q You think it is on both?

MR. DALTON: Yes. If I may just a moment, the search by Officer Weiss, if we want to call it a search, every court has picked up a new name. And we try to stay away from the word "search," because we really do not know what a search is. It was done by Officer Weiss with the

intention of securing some property of Mr. Dombrowski. Five different times there were fact-finding hearings where this fact could have been refuted by Mr. Dombrowski, including a hearing before the district court in Milwaukee which he did not avail himself of.

So, the only thing in the record is Mr. Weiss's statement that he was looking for the gun. He had no knowledge of any other crime. He was completely surprised by the evidence of murder which emerged when he opened the trunk.

Q At that time, the only crime, if any, was the crime of drunken driving and consequences of the accident; is that right?

MR. DALTON: That is right, Your Honor.

I think on that point that nowadays police officers are not just law enforcement people. We have millions of vehicles on the highway every day and everywhere where you and I drive our vehicles, we might force a local law enforcement official to either arrest us for violating the law, to come to our aid if we have an accident, to come to our aid if we have a heart attack; in any of a number of circumstances a law enforcement officer may be called upon to help someone who is in a vehicle away from his home.

It seems to me that this Court should look at what we are calling now, I guess, inventory searches, and

see whether or not you cannot find some area where a person gets out on the highway with his vehicle does not leave behind a little bit of that privacy we are so concerned about. It is very difficult to play the dual role of the law enforcement officer and the helper.

Q I take it the officer, his excuse or his motive was that he wanted--if there was a gun in the car, he did not want it floating around in that car. He wanted to get it out.

MR. DALTON: That is right, Your Honor. And the record is so clear on that that we think that this act of God, of sending that rooky police officer to look after this fellow officer's gun, should not result in the freeing of a man who has been convicted fairly of first degree murder.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dalton.

Mr. Mulligan.

ORAL ARGUMENT OF WILLIAM J. MULLIGAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MULLIGAN: Mr. Chief Justice, and may it please the Court:

We have before us two searches, a search of a Ford Thunderbird and a search of a Dodge. In connection with the search of the Ford Thunderbird, I think it is imperative to consider some of the additional facts surrounding the

circumstances of the various searches that were conducted of that automobile.

As counsel indicated, on September 11, 1967, at 10:30 at night, that car was involved in a one-car accident. Mr. Dombrowski, an off-duty Chicago police officer, summoned the sheriff's deputies to the accident, to come with him to the accident scene. He communicated with those officers during that time period. He assisted them in locating the accident. He told him what his occupation was, told them that there were no other persons involved in the accident, that he was alone at the scene. He told them three different versions of how the accident occurred. He furnished them his license and identification.

The officers investigated that accident and called the record. Prior to the removal, Officer Boudry searched through the entire interior of the car. He searched under the seat, in the glove compartment, and in the back seat of that car.

Q Mr. Mulligan, when you said he gave them three different versions, were they inconsistent versions of the accident?

MR. MULLIGAN: In some details I think you would have to consider them to be inconsistent. Basically I think you could characterize them as inconsistent, yes.

Q At that time your friend indicated that

Dombrowski was suffering from over-indulgence in alcohol and perhaps from shock from the accident. Do you agree with that?

MR. MULLIGAN: I think the record indicates, Mr. Chief Justice, that Dombrowski had been drinking. But it was not until for the first time at the West Bend police station that the record indicates that he became in any way uncommunicative. And it was not until at two o'clock the following morning when he was in the West Bend Hospital that he was unable to speak at all; and at no prior time at the accident scene or at the West Bend sheriff's department or at the police department did the officers who searched the car for the gun even ask Mr. Dombrowski whether he was required to have a gun and whether he in fact had such a gun or where it might be located.

Q Do you accept the version that what they were doing they were doing as a favor for a fellow officer anyway? That is the reason they were searching for the gun?

MR. MULLIGAN: Officer Weiss testified that he was searching for the officer's service revolver. I do not think the motivation is clear whether this was a search for some beneficial purpose or whether it was investigatory in nature. I think the record could be interpreted either way with respect to that. It is not clear from the record.

At the scene, when Officer Boudry made this search,

he locked the car before it was towed away. The car was removed to a private garage in Kewaskum. It was not in police custody. No representative of the sheriff's office remained with the vehicle.

It is not clear from the record where the keys to the automobile were.

Q The tow truck, I suppose, belonged to the service station to which the car was taken?

MR. MULLIGAN: Yes, Mr. Justice.

Q This was a small town. Did the police or the sheriff's office have facilities to impound automobiles and to assign a man to guard it?

MR. MULLIGAN: I think that it is clear from the record that had the sheriff's department desired to impound the car and keep it in safekeeping, this Thunderbird, they would have done what they did later on. They would have towed the car to the sheriff's garage--

Q With the Dodge, what they did later on with the Dodge?

MR. MULLIGAN: Yes. And I think that indicates that they did have the facilities, had they desired to do so, to safekeep it. And subsequently with respect to one of these vehicles they parked it at a county garage while it was being held to the trial.

Q There was no reason, of course, to impound the

rented Thunderbird. There was no, at that time, grounds to suspect murder or anything else except, as the Chief Justice said a few moments ago, just that Dombrowski had been drunk and had a wreck.

MR. MULLIGAN: That is correct. There was no probable cause for any reason to seize the vehicle at that time.

Q The Thunderbird activity of the place was carried on by Washington County police, was it not?

MR. MULLIGAN: That is correct, Mr. Justice.

Q And the ultimate impoundment of the Dodge was carried on by Fond du Lac County police?

MR. MULLIGAN: Yes, that is correct.

Q Is it not conceivable that the Washington County sheriff might have one modus operandi and the Fond du Lac County sheriff have another?

MR. MULLIGAN: It is possible that there could be separate methods of operation. However, it is indicated in the record that when Sheriff Howard went to execute the search warrant, one was issued on September 12th for the Dodge, and a search warrant was issued on September 12th for the Thunderbird. And he, when he went to search for the-- execute the search warrant for the Thunderbird, went to the sheriff's garage at West Bend to execute it. So, it is only logical to presume that in the interim that that vehicle,

after the goods, bloody articles were located, was taken to the sheriff's garage at West Bend, Wisconsin and impounded there.

Q I am not sure just what point or whether you had a point in mind in comparing the casual way the first car, the Ford, involved in the accident was taken to the filling station as compared with the more careful steps with respect to the Dodge. Would you agree that it might be reasonable to take very casual steps with respect to just a damaged car with no criminal acts involved except drunken driving and much more precise and careful steps when there appeared to be a homicide involved?

MR. MULLIGAN: Yes, I think there is a logical basis for treating them differently, and I think what is indicated here by the difference in the way these cars were handled is that in the one case, with respect to the Thunderbird, that it was never considered to be in police custody. It was merely taken to the private garage and left there in a locked condition, as opposed to the way you would handle something that was in your custody where you are maintaining a chain of control over the article.

Q That automobile involved in the accident would be an important item of evidence even in a drunk driving charge, would it not, to show the extent of the damage as it would bear upon the quality of the driving just as an

evidentiary matter?

MR. MULLIGAN: I doubt that such evidence would normally be offered in a drunk driving case. The fact the car has been in an accident really is not indicative of the nature of the driving that took place prior to it. And I think there would be some question as to whether it would be material or relevant if it had been seized as evidence of that crime. But there is no indication in the record here that it was seized.

Q Mr. Dombrowski ran into some immovable object, did he not?

MR. MULLIGAN: Yes.

Q He did not hit another car.

MR. MULLIGAN: No.

Q Do you suggest that the condition of the car would not be an evidentiary, a relevant, piece of evidence in establishing the drunk driving charge?

MR. MULLIGAN: I think there is some question whether it would be. I think the officers testifying as to the location of the car being off the highway and it had left the highway, is probably as indicative of drunk driving as the particular extent of damage that may have occurred to the vehicle itself.

The officers that left the accident scene at 11:33 that night went to the West Bend sheriff's office. At the

West Bend sheriff's office, Mr. Dombrowski conferred with an assistant district attorney there. It was not until 11:58 that evening that he was arrested for drunk driving. He was taken to the West Bend Police Department. There he was offered an opportunity to take a breatholizer test but refused that test.

He was then taken to the West Bend Hospital to be treated for injuries that he had sustained in the accident. At the hospital he talked by telephone to the doctor, and it was not until the doctor came to the hospital at 2:00 o'clock that there was any indication that Dombrowski was uncommunicative.

Q Does the record show what was the matter with him at that time? That is quite a period of time. Was he still drinking or what was it?

MR. MULLIGAN: He had presumably been still drinking until the officers met him at the Glacier Inn in Kewaskum some time after 10:30 that evening. He was described in the hospital as having blood upon him, the possibility of nose bleeding. And at one point his legs began shaking and his head went back, I believe is the way it was described in the record by the doctor when he testified. And at this point he was not able to express himself.

The doctor, with the officers, called Dombrowski's

wife in Chicago to see if there were some other explanation as to what his condition could be other than perhaps drinking and a nosebleed from the accident.

During that conversation, the police officers did not take the opportunity to inquire of Mrs. Dombrowski as to what she might have known with respect to the officer's revolver, whether he had it with him or where it might be located.

Q Who made that call, the doctor or the police?

MR. MULLIGAN: The police officers together with the doctor made that call.

Q Are you suggesting that the doctor wanted to find out whether he suffered perhaps from epilepsy or a heart condition or something of that kind?

MR. MULLIGAN: I think that is indicated in the record, that he was seeking to see if there was some other medical reason for the man's condition at that time.

After this, Dombrowski remained in the hospital under guard at all times thereafter. At 2:13 that morning, approximately four hours after the time of the accident and about two and a half hours, two and a quarter hours, from Mr. Dombrowski's arrest, the Officer Weiss went back from West Bend to Kewaskum, Wisconsin to the private garage, unlocked the car, and again searched the interior of the vehicle. He had to unlock the trunk to look into the trunk

as he searched for Dombrowski's gun.

Q Does the record show that he originally searched the car for the gun? When they first went out there, did they not search the whole car for the gun?

MR. MULLIGAN: Yes, the record indicates that initially Officer Boudry searched the entire interior part of the automobile. He went in the glove compartment, under the seat, in the back seat, of the vehicle before he locked it and had it towed away.

Q Was he searching for the gun?

MR. MULLIGAN: Yes.

Q Or just searching for anything?

MR. MULLIGAN: I believe that the record at that point is that he was searching. Weiss described the search as a search for the service revolver. It is not even clear from the record whether at the accident scene or at any time prior to that that Dombrowski himself was searched to see if he had the weapon on his person. And that was noted by the Wisconsin Supreme Court when they considered this matter.

Q That would not be very difficult to observe when they took him into the station and down to the hospital. In that period of time they certainly would just by casual observation have known whether he had a typical service revolver on him, would they not?

MR. MULLIGAN: Mr. Dombrowski was off duty at the

time, was not in uniform. Perhaps at the hospital, if he was changed into hospital attire, it might have been possible to note that, but I am not so sure that a service revolver could be detected on an off-duty police officer wearing civilian clothes and concealing it upon his person.

There never was any consent by Dombrowski to search the Thunderbird. There does not appear, when it comes to the time of the second search of that automobile, to have been anything additional that had come to the police attention that would have given them probable cause to search the vehicle at 2:13 that morning.

The county court of--

Q Would it be unreasonable for police to assume in this day and age that an unattended car sitting in a filling station lot overnight might be broken into, both trunk and the body of the car, by either vandals or youngsters or somebody bent on theft?

MR. MULLIGAN: Mr. Chief Justice, I do not think that is a reasonable conclusion to reach in a world community in Wisconsin in the nature of Kewaskum, Wisconsin, that it became any more a target of a break-in that perhaps Dombrowski's home in Chicago where he may well have kept the service revolver. And I do not think the fact that he was in Wisconsin would have given them a right to have his home in Chicago searched as a possibility.

Q I am not talking about the right. I am talking about the practical aspect. Are you suggesting that conditions are so safe in that part of Wisconsin that no one ever has his car broken into at night if it is left out unattended?

MR. MULLIGAN: I am not sure that it has never occurred, but I think--

Q That is not as often as Chicago?

MR. MULLIGAN: Yes, I would agree. It is less likely that any risk to the vehicle in a town of the nature of Kewaskum, Wisconsin than there is in Chicago or New York or any larger city. And here we are dealing with a vehicle that had already been searched in the interior and there was nothing indicative of anything that would be a target.

Q But the trunk had not been searched?

MR. MULLIGAN: The trunk had not been searched but was locked and presumably is not the type of thing that you could easily get into without a key.

The county court of Fond du Lac County upheld the search of the Thunderbird in part on the basis that it was a search incident to the arrest for drunk driving. We think that it is clear from the application of the Preston case that such a search that was conducted at a different time and place could not be upheld as incident to the arrest.

Q Mr. Mulligan, the revolver never was found, the

automatic, I guess; it never was found, was it?

MR. MULLIGAN: It never was found. When the trunk was searched--

Q What was found was that bloody material in the trunk of the Thunderbird?

MR. MULLIGAN: That is correct.

Q And that was introduced in evidence over objection, was it?

MR. MULLIGAN: Yes. Pre-trial motions were made to suppress, and a voir dire examination was held at trial in which the motions to suppress were renewed.

Q Was any alleged murder weapon ever found or introduced in evidence?

MR. MULLIGAN: No, no such weapon was ever produced.

Q The victim was shot, was he not?

MR. MULLIGAN: The victim was shot and apparently beaten with some object. During the closing arguments it was even suggested that the defendant could have produced the gun, his own service revolver. Ballistics examinations had indicated that the bullet had been rifled with six lines and grooves to the left and that evidence was offered that a Colt revolver, such as registered to the defendant, had such rifling.

Q You were not in the trial of the case, were

you?

MR. MULLIGAN: I was not.

Q You were appointed only at this stage of the case?

MR. MULLIGAN: I was appointed in the Seventh Circuit court of appeals.

Q Seventh Circuit too?

MR. MULLIGAN: Yes.

Q Mr. Mulligan, I take it from what you have said that the exclusionary rule issue was raised before the trial court.

MR. MULLIGAN: The motions to suppress--

Q To exclude the evidence.

MR. MULLIGAN: --was made before the trial court, that is correct, and preserved in the Wisconsin Supreme Court.

Q In the Supreme Court. The trial was in 1968, was it not?

MR. MULLIGAN: Yes.

Q Nearly five years ago.

MR. MULLIGAN: That is correct.

Q You make no claim in this case that--or was any claim made in the district court on habeas that this man was innocent of the crime?

MR. MULLIGAN: It was alleged in the district

court petition that he had pled not guilty to the offense, and there was no confession in here. There has been no indication that Mr. Dombrowski has ever indicated any guilt for this crime.

Q How did his lawyer know where the body was?

MR. MULLIGAN: Presumably Mr. Dombrowski communicated with Attorney Schloemer in the hospital room and told him information that a body could be found in the picnic area of his brother's farm and that a writ of prohibition had been sought through the Wisconsin Supreme Court to prohibit this disclosure of attorney-client privileged information, but that court interpreted that there had been an intentional--a desire that this information be communicated to other sorts. But the mere statement that there was a body on that farm is not a confession that this man is a person who committed the crime of murdering that person.

We also submit from the record in this case that the vehicle was never in police custody--

Q The Thunderbird, the Ford?

MR. MULLIGAN: Of the Thunderbird. And Wisconsin has no law which would authorize authorities to take into custody vehicles that had been involved in auto accidents or vehicles that had been used by drunken driver. There are laws that are enacted now in Wisconsin which would permit impounding of vehicles for use in connection with drug

offenses and other matters.

Q Do you think you have to have an explicit statutory authority, Mr. Mulligan, to take into police custody a car involved in a drunken driving situation where there was damage to the car?

MR. MULLIGAN: If it was not being seized as evidence of that particular crime, if it was being impounded into police custody for some other purpose, such as was the case in Cooper v. California.

Q But it could be impounded as evidence in the drunk driving case--

MR. MULLIGAN: Yes.

Q --inherently, could it not?

MR. MULLIGAN: Presumably it could be, but there is no indication that this car ever was--

Q I understand your argument that that was not the purpose of it, but you do concede that they would have the power to take it for that purpose if they wanted to use it as evidence?

MR. MULLIGAN: Yes.

Q Mr. Mulligan, what material found in the Thunderbird was introduced at the trial of the defendant?

MR. MULLIGAN: Basically all the materials found in the Thunderbird were introduced, consisted of a bloodied night stick, consisted of a towel, consisted of a floormat

which by expert testimony was later linked to the floormat in the Dodge, a rule book, a hot sheet from the Chicago Police Department, some pants that had some blood splattering on them. There were 13 exhibits that were seized from the Thunderbird that were all offered and admitted into evidence over objection.

Q I suppose, then, if they were improperly admitted there should be an affirmance here without ever reaching the question of what was taken from the Dodge.

MR. MULLIGAN: No, I think we have two searches involved here, both of which had a substantial effect on the outcome of the trial. The articles that were taken from the Dodge were also--

Q What I have said is, if the materials taken from the Ford should not have been admitted, there has to be a reversal of this conviction, does there not?

MR. MULLIGAN: Yes.

Q And, therefore, it would not be necessary to reach the other question.

MR. MULLIGAN: That is right. The court of appeals decided the case based on the search of the Thunderbird automobile.

Q Certainly that is the way Judge Knock read it, because that is the only search to which he addressed his dissent, was it not?

MR. MULLIGAN: That is right. And the court further on in its opinion indicated that in the light of a possibility of a retrial, in the light of effective administration of justice, it expressed its opinion with respect to the legality of--

Q That was advisory, apparently, and not an actual decision on that search, was it not?

MR. MULLIGAN: I think that it was not the actual decision of the court and it was advisory in character. The court only ruled on one aspect of the--even in an advisory nature with respect to the search of the Dodge, namely, the search by Mauer.

There was also a question that was raised with respect to the legality of the search warrant that had issued for the vehicle and the court specifically withheld expressing an opinion as to the constitutionality of the search warrant that was in fact issued, doing so because it held that the Mauer search by the state crime lab representative was improper and therefore where the items were seized it did not have to reach the validity of the search warrant which had been challenged as a general warrant in the light of the nature of the failure to describe the things particularly that were to be searched for or seized.

Q Mr. Mulligan, did the defendant take a stand in this case?

MR. MULLIGAN: No, the defendant did not take the stand. He did offer evidence during the course of the trial and there was testimony that he submitted from a family member. He called a police officer or officers to testify in connection with the case. But he did not personally testify.

I might comment only with respect to the search of the Dodge aspect of this case that the Officer Mauer searched the vehicle, was his testimony, immediately after receiving the warrant. He went out and he searched the vehicle. There was no indication that he was hampered by light conditions. He indicated at the time that he found bloodied articles in the car. He also indicated on his return that he located a tie away from the vehicle, some articles that were located underneath the car when it was searched, matches, straw. He testified on the return of the warrant on September 14th, he indicated what was discovered in the search pursuant to the warrant, never indicated that the items that had been seized at that time by Mr. Mauer on the following day were at all related to that search warrant.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Mulligan. Mr. Dalton, do you have anything further?

[Continued on page following.]

REBUTTAL ARGUMENT OF LE ROY L. DALTON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DALTON: Thank you, Your Honor.

The reasonableness of suspecting that someone may try to get into the trunk of a disabled automobile has been brought up. And the allegation by counsel is that in a small town you do not have those worries. I know a lot of small town district attorneys who would like to have some proof of that when they are prosecuting people for breaking open trunks and taking spare tires and wheels and especially when they see a car disabled from out of state.

Now naive are we? This is 1973. People move from here to there to everywhere, and small towns are no--

Q It was not in 1973 when this happened.

MR. DALTON: No. Pretty close to it, Your Honor.

Q Is Kewaskum on any important highway?

MR. DALTON: It is on Highway 45 between Milwaukee and Fond du Lac.

I would just like to close by saying that we are not here to determine the guilt or innocence of Dombrowski. He has been found guilty beyond any reasonable doubt by the proper courts in the State of Wisconsin. We are here on a collateral attack upon that judgment. And what you have to determine is whether or not this Court is going to punish two law enforcement people who thought they were doing their

duty five years ago, five and a half years ago. And what your theory will have to be is that if you free this man, you will thereby have slapped those two officers in the face and you will have told them, "Do not do it again," and you will have told other officers, "Do not do this." It will not work.

One of the officers is no longer in Wisconsin. I do not know if he is even in law enforcement.

You cannot by this method satisfy society's needs to deal with criminals. And I would urge that you recognize that this man is a convicted murderer and reverse the Seventh Circuit. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dalton.

Mr. Mulligan, you served at the Court's request and by appointment here as you did in the Seventh Circuit by the appointment of that court.

MR. MULLIGAN: Yes, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: And we want to thank you for your assistance to the Court and, of course, your assistance to the man you were asked and appointed to represent.

MR. MULLIGAN: Thank you, sir.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 11:07 o'clock a.m., the case was submitted.]