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Constitutional Law: The Fourth Amendment and the Wisconsin Constitutional Provision Against Unreasonable Searches and Seizures. (State v. Starke).

Joel L. Massie

NOTE

CONSTITUTIONAL LAW — Criminal Procedure—The Fourth Amendment and The Wisconsin Constitutional Provision Against Unreasonable Searches and Seizures. *State v. Starke,* 81 Wis. 2d 399, 260 N.W.2d 739 (1978).

> *There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. George Orwell, Nineteen Eighty-Four.*[1]

A massive amount of information is in fact available to a prying bureaucracy[2] and, at least in the area of bank records, the search and seizure provision of the fourth amendment to the United States Constitution[3] has proved to be a brittle shield. This note will examine recent decisions of the United States and Wisconsin Supreme Courts[4] which dealt with the protection afforded by the fourth amendment and the comparable state constitutional provision[5] when officials seize an individual's bank records from banking institutions to serve as evidence of crime by the bank customer. Particular attention will be paid to Justice Shirley Abrahamson's concurring opinion in *State v. Starke,*[6] which advocated the use of the search

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1. THE ORWELL READER at 397 (1956 ed.).

2. *See* Sanford, *California Bankers Association v. Schultz: An Attack on the Bank Secrecy Act,* 2 HASTINGS CONST. L.Q. 203, 204-06, 218 (1975).

3. U.S. CONST. amend. IV reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4. *See* United States v. Miller, 425 U.S. 435 (1976); California Bankers Association v. Schultz, 416 U.S. 21 (1974); State v. Starke, 81 Wis. 2d 399, 260 N.W.2d 739 (1978). *See also* Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974); Alexander & Spurgeon, *Privacy, Banking Records and the Supreme Court: A Before and After Look at Miller,* 10 SW. U.L. REV. 13 (1978) [hereinafter cited as Alexander & Spurgeon].

5. The text of art. I, § 11 of the Wisconsin Constitution is the same as that of the fourth amendment. There are slight differences in punctuation.

6. 81 Wis. 2d at 419-23, 260 N.W.2d at 749-52. Justice Heffernan joined in the concurring opinion.

and seizure provision of the Wisconsin Constitution in place of the fourth amendment.

United States v. Miller[7] held that a bank depositor had "no protectable Fourth Amendment interest"[8] in records kept by a bank pursuant to the Bank Secrecy Act of 1970[9] and obtained by the police as evidence of criminal activity on the part of the depositor. Following logically from this holding was the Court's validation of the use of subpoenas duces tecum, rather than warrants, to obtain such records.[10]

For a full understanding of the implications of *Miller,* attention must first be directed to *California Bankers Association v. Schultz.*[11] That decision upheld the constitutionality of the Bank Secrecy Act and, in so doing, called the claim by plaintiff-bankers of a possible fourth amendment violation premature.[12] The Act provides for the keeping of records by banks of depositor's transactions to aid in possible criminal prosecutions[13] but makes no provision for the seizure of such records. The Court therefore reasoned that any adjudication of a claim based on the legal process used to seize the records would have to await a proper party and an actual seizure.[14]

Thereafter, in *Miller,* faced with such a set of facts, the Court held that the defendant had no protected property or privacy interest in the bank records. Dealing first with the question of property interests, the Court found that, since the records obtained by subpoena were copies made by the bank rather than the depositor's originals, the depositor could not claim a proprietary interest in them.[15] Citing *Katz v. United States,*[16] the Court also undertook a privacy analysis, with the same result. Reasoning that defendant had "knowingly expos[ed]" his personal affairs to the public by maintaining a bank account, the Court stated that the depositor had as-

7. 425 U.S. 435 (1976).
8. *Id.* at 437.
9. § 101, 12 U.S.C. 1829b(d) (1976).
10. 425 U.S. at 445-46.
11. 416 U.S. 21 (1974).
12. *Id.* at 51-54.
13. 12 U.S.C. § 1829b(a)(2) (1976).
14. 416 U.S. at 51-52. The Court suggested that the depositor would be the proper party to adjudicate such a claim. *Id.*
15. 425 U.S. at 440-41.
16. 389 U.S. 347 (1967).

sumed the risk that the records might also be exposed to the government. After such a knowing exposure, the Court found no "reasonable expectation of privacy" on the part of the depositor could exist; defendant therefore had no protected privacy interest in his bank records.[17]

The *Miller* Court's reliance on *Katz*[18] in support of this position was strained. In *Katz,* the defendant's phone booth conversations were the subject of a warrantless tap by the F.B.I. The Supreme Court rejected petitioner's formulation of the issue in terms of constitutionally protected areas and held that the "Fourth Amendment protects people not places."[19] In excluding the fruits of the wiretap, the Court discredited the traditional property analysis, finding that it no longer controlled the right of the government to search and seize.[20]

In concurrence, Justice Harlan formulated a test for this "reasonable expectation of privacy," concluding that the protection would be afforded subject to a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[21] It takes no great leap of faith, after examining the reasoning used in *Katz,* to believe that, had the *Miller* Court followed the logic of that decision, the latter case would have been decided differently.

In the recent decision of *State v. Starke,*[22] the Wisconsin Supreme Court was presented with and declined the opportunity to decide a similar issue under article I, section 11 of the Wisconsin Constitution.[23] Chief Merrill Starke of the Pewaukee Police Department was arrested in August of 1976 for sundry offenses allegedly committed as a public servant.[24] The chief

17. 425 U.S. at 442-43.

18. 389 U.S. 347 (1967).

19. *Id.* at 350-51.

20. *Id.* at 353. Justice Black, in dissent, charted the history of the property analysis. *Id.* at 364-74 (Black, J., dissenting).

21. *Id.* at 361 (Harlan, J., concurring). Under this test, of course, any expectation by depositors that their bank records were private could be overcome by the mere posting of a notice stating the contrary. *See* 76 MICH. L. REV. 154, 157-58 (1977) and text accompanying notes 55-58 *infra.*

22. 81 Wis. 2d 399, 260 N.W.2d 739 (1978).

23. *Id.* at 414-15, 260 N.W.2d at 747-48.

24. These offenses included theft, procuring and causing to be procured a false and fraudulent insurance claim, obstructing justice and misconduct in public office. *Id.* at 403, 260 N.W.2d at 742.

was accused of "fixing" traffic citations for family members and selling contraband firearms. At the time of his arrest, he allegedly locked an unexecuted arrest warrant against a niece and another in his desk drawer. Later that day, Waukesha officials procured a search warrant for Starke's desk and files, whereupon the aforementioned warrants and other pieces of evidence were seized.[25]

The investigation of Starke's activities continued and on August 13, 1976, a search warrant was issued to procure records of Starke's checking account from his bank. Pursuant to the warrant, Starke's bank records were seized to be used as evidence at his trial. After the information was filed against Starke in January 1977, he moved to suppress evidence obtained in the two searches and evidence which was the fruit of those searches.[26]

The trial court held that the warrants were based on overbroad affidavits which lacked probable cause; a blanket suppression motion was therefore granted. Thereafter, the prosecution conceded that without this evidence it could not proceed and the case was dismissed.[27]

On appeal, the Wisconsin Supreme Court reversed, finding sufficient probable cause to support the first warrant and no overbreadth in the affidavit supporting the warrant.[28]

The court held further that the warrant issued for the search of Starke's bank records was based upon probable cause. Therefore, the court declined to decide the question of the necessity of a warrant in such a case. "We do not reach this argument. On the facts presented, we conclude that the search under review was conducted pursuant to a valid warrant. It is therefore unnecessary to determine whether a warrantless search would have been objectionable."[29]

In arguing that no privacy or property rights attached to Starke's bank records, the state had asserted that *Miller* made a warrant unnecessary since "no intrusion into any area in which respondent had a protected Fourth Amendment inter-

25. *Id.* at 403-04, 260 N.W.2d at 742-43.
26. *Id.* at 405-06, 260 N.W.2d at 743.
27. *Id.* at 406-07, 260 N.W.2d at 743-44.
28. *Id.* at 412, 260 N.W.2d at 746.
29. *Id.* at 414-15, 260 N.W.2d at 748.

est"[30] had been made. Seeking to avoid *Miller,* the defendant argued that the court should focus on article I, section 11 of the Wisconsin Constitution rather than the fourth amendment and suggested that *Miller,* decided under the Federal Constitution, was not controlling on the court's interpretation of the state constitutional provision.[31]

While the majority refused to reach this issue, Justice Abrahamson, concurring in the result, reasoned that "the majority goes at this issue backwards. The first issue to decide is whether bank depositors have a constitutionally protected interest in these bank records. If depositors have a constitutionally protected interest, they can object to the validity of a warrant . . . ."[32]

Conceding that the wording of article I, section 11 is identical to that of the fourth amendment, Justice Abrahamson emphasized her belief that rulings under the state constitution should be developed independently of the federal.[33] Citing *State v. Doe,*[34] she reiterated that it is this state's prerogative to give greater protection to personal liberties if "it is the judgment of [the Wisconsin Supreme Court] that the Constitution of Wisconsin and the laws of this state require that greater protection . . . ought to be afforded."[35] And it was her judgment that in the case of bank records, that greater protection should indeed be afforded. While not citing *Katz,* Justice Abrahamson stated that the "reasonable expectation of privacy" test[36] should be the touchstone in deciding whether or not one has a constitutionally protected interest against unreasonable search and seizure under the Wisconsin Constitution: "I would hold that each person has a reasonable expectation of privacy in his or her bank statement and records which is protected under art. I, sec. 11 of the Wisconsin Constitution."[37]

30. 425 U.S. at 440.

31. Brief for Defendant in Error at 24, State v. Starke, 81 Wis. 2d 399, 260 N.W.2d 739 (1978).

32. *Id.* at 419, 260 N.W.2d at 750 (Abrahamson, J., concurring).

33. 78 Wis. 2d 161, 254 N.W.2d 210 (1977).

34. 81 Wis. 2d at 421, 260 N.W.2d at 751 (quoting State v. Doe, 78 Wis. 2d 161, 172, 254 N.W.2d 210, 216 (1977)).

35. *Id.*

36. *See* 389 U.S. at 360-61 (Harlan, J., concurring) (explaining twofold test).

37. 81 Wis. 2d at 421, 260 N.W.2d at 751.

Such was the reasoning employed by the California Supreme Court in *Burrows v. Superior Court*,[38] upon which Justice Abrahamson relied. In *Burrows*, bank records of an attorney charged with misappropriation of funds were provided to authorities by a bank upon request.[39] Justice Mosk, writing for a unanimous majority, found such action to be violative of the California Constitution's prohibition against unreasonable search and seizure.[40] The California court outlined a two-tiered test for determining the legality of a search under the state constitution. First, it must be decided "whether a person has exhibited a reasonable expectation of privacy."[41] If so, under this analysis, the question becomes "whether that expectation has been violated by unreasonable governmental intrusion."[42] As to the first test the court concluded that,

> A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes [and] that the bank would maintain the confidentiality of those papers which originated with him in check form and of the bank statements into which a record of those same checks had been transformed . . . .[43]

Thereafter, the court found that the warrantless taking in *Burrows* was unreasonable.

> If this search may be deemed reasonable, nothing could prevent any law enforcement officer from informally requesting and obtaining all of a person's or business entity's records which had been confided to a bank, though such records might have no relevance to a crime, if any, under investigation; and those records could be introduced into evidence in any subsequent criminal prosecution.[44]

Justice Abrahamson, quoting extensively from *Burrows*, advocated the adoption of the California court's reasoning by the Wisconsin court. To summarize her approach, she would

38. 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

39. *Id.* at 240-41, 529 P.2d at 591, 118 Cal. Rptr. at 167.

40. *Id.* at 245, 529 P.2d at 594-95, 118 Cal. Rptr. at 170-71. The wording of the California search and seizure section is substantially identical to that of the fourth amendment and Wisconsin Constitution. CAL. CONST. art. I, § 13; 13 Cal. 3d at 242 n.2, 529 P.2d at 593 n.2, 118 Cal. Rptr. at 169 n.2.

41. *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

42. *Id.*

43. *Id.*

44. *Id.*

not, in the first instance, depart from Justice Powell's analysis in *Miller.* The threshold question, then, is whether a party contesting the search has a constitutionally protected interest.[45] It is at this point that Justice Abrahamson would part ways with the federal judiciary and reach a contrary conclusion, as the California court did in *Burrows.*[46] In contrast to *Miller,* she would find a "reasonable expectation of privacy" in bank records under this state's constitution. From that point she would evaluate the reasonableness of the search. Thus, in *Starke,* while a constitutionally protected interest would be present under this analysis, the result would not differ from that of the majority.

The distinction between the *Starke* majority formulation and the approach taken in the concurring opinion is that, under the latter, a workable and independent mechanism for evaluating the legality of searches under the state constitution was suggested. This analysis appears to be the only method of avoiding the "rock and hard place," predicament faced by a bank depositor in light of *California Bankers Association* and *Miller.* Justice Marshall, dissenting in *Miller,* noted this dilemma:

> "[I]t is ironic that although the majority deems the bank customer's Fourth Amendment claims premature, it also intimates that once the bank has made copies of a customer's checks, the customer no longer has standing to invoke his Fourth Amendment rights when a demand is made on the bank by the Government for the records . . . . By accepting the Government's bifurcated approach to the recordkeeping requirement and the acquisition of the records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late . . . . Today, not surprisingly, the Court finds respondent's claims to be made too late."[47]

Disallowance of a depositor's objections gives law enforcement agencies leave to investigate an individual's bank records at will. Moreover, the potential for abuse of discretion by ad-

45. "We find that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest." 425 U.S. at 440.

46. 81 Wis. 2d at 421, 260 N.W.2d at 751 (Abrahamson, J., concurring).

47. 425 U.S. at 455 (Marshall, J., dissenting) (quoting California Bankers Ass'n v. Schultz, 416 U.S. 21, 97 (Marshall, J., dissenting)).

ministrative agencies in issuing summonses is real.[48] Contrary to Justice Mosk's pre-*Miller* observation, it does indeed seem "open season on personal bank records."[49]

After *Miller,* it is obviously for the states to afford whatever protection is to exist in this area. Justice Abrahamson's approach, borrowed from *Burrows,*[50] is no more than a logical extension of the *Katz* privacy-centered analysis.[51] *Miller,* on the other hand, has been fairly criticized as a "return to . . . eighteenth century [property] analysis"[52] because of its approach to records as the property of the bank and not of the depositor. Additionally, the *Miller* Court's assumption of risk/waiver analysis lacks a firm basis. Indeed, the *Miller* Court, in citing *Katz* for the proposition that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection,"[53] appears to have forgotten the line following: "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[54]

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48. *See* Alexander & Spurgeon, *supra* note 4, at 14. Most of the potential evils of free discretion of I.R.S. agents in using administrative summonses have been remedied by the Tax Reform Act of 1976. *Id.* at 31-32. Likewise, some procedural protection has been afforded by the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (1978). This legislation, however, is directed against federal agencies and personnel and would have no effect on state law enforcement officials in a situation like that presented in *Starke. Id.* at § 1101(3).

49. 13 Cal. 3d at 247, 529 P.2d at 595, 118 Cal. Rptr. at 171-72.

50. The state's argument in *Starke* indicates a belief that *Burrows* is no longer a viable state constitution interpretation since it was pre-*Miller.* Reply Brief of Plaintiff in Error at 5-6, State v. Starke, 81 Wis. 2d 399, 260 N.W.2d 739 (1978). This is not so; after *Miller* the California Supreme Court reaffirmed the *Burrows* holding that a bank customer has a reasonable expectation of privacy in his other records. *See* Athearn v. State Bar, 20 Cal. 3d 232, 235, 571 P.2d 628, 629, 142 Cal. Rptr. 171, 172 (1977). And the California Legislature has codified the *Burrows* holding. *See* CAL. GOV'T CODE §§ 7460-93 (West Supp. 1979). Justice Brennan embraced the logic of *Burrows* in his dissent to *Miller.* 425 U.S. at 447-55 (Brennan, J., dissenting).

At least one other state has cited *Burrows* and recognized a state constitutionally protected interest in bank accounts. *See* State v. McCray, 15 Wash. App. 810, 551 P.2d 1376 (1976).

51. "[T]he premise that property interests control the right of the Government to search and seize has been discredited." 389 U.S. at 353 (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)). *See also* Alexander & Spurgeon, *supra* note 4, at 14, 22-26; Note, *A Reconsideration of the Katz Expectation of Privacy Test,* 76 MICH. L. REV. 154 (1977).

52. Alexander & Spurgeon, *supra* note 4, at 14.

53. 425 U.S. at 442 (quoting Katz, 389 U.S. at 351 (1967)).

54. 389 U.S. at 351.

Any test should then hinge upon the depositor's reasonable expectation of privacy. However, since it has been suggested that the government could negate any such expectation simply by posting notice that one's bank account will be searched,[55] the test should be refined one degree further. In order to avoid loss of one's constitutionally protected interest, the right of an expectation of privacy as to bank records and not the subjective expectation itself should be the linchpin.[56] "The test must recognize that the advance notice that certain searches will be conducted is an intrusion in itself."[57]

In summary, if there is a concern in this state for the privacy interests of bank depositors, Justice Abrahamson's concurrence in *State v. Starke* should be well noted. A test recognizing the right to a reasonable expectation of privacy in confidential bank records[58] and then analyzing any particular search as reasonable or unreasonable could be adopted under article I, section 11 of the Wisconsin Constitution.

This state has given broader recognition to civil liberties than the federal courts in years past.[59] In the area of bank records, the court, following its own lead, should recall that,

> Long before it was constrained to do so by the fourth and fourteenth amendments to the United States Constitution, this court relying on the Wisconsin Constitution sustained and enforced the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.[60]

JOEL L. MASSIE

55. Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 157-58 (1977).

56. *Id.* at 164.

57. *Id.*

58. The bank records are merely copies of depositor's private papers which could not, of course, be seized from him or her without a properly executed warrant. *See, e.g.*, Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923)(exclusionary rule for unlawful search and seizures thirty-eight years before Mapp v. Ohio, 367 U.S. 643 (1961)); Carpenter v. Dane County, 9 Wis. 249 (1859)(right to counsel 102 years before Gideon v. Wainwright, 372 U.S. 335 (1963)).

59. Laasch v. State, 84 Wis. 2d 587, 598, 267 N.W.2d 278, 285 (1978) (Abrahamson, J., concurring).