

The Burger Court Opinion Writing Database

Ybarra v. Illinois

444 U.S. 85 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

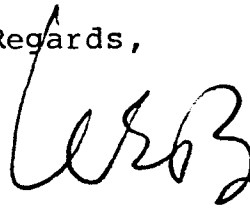
October 15, 1979

Re: 78-5937 - Ybarra v. Illinois

Dear Bill:

I would be glad if you will put your hand to a
dissent in this case.

Regards,



Mr. Justice Rehnquist

cc: Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

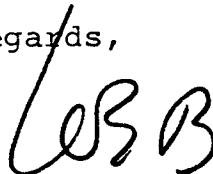
November 20, 1979

Re: 78-5937 - Ybarra v. Illinois

Dear Bill:

I am generally in accord with your careful, analytical dissent but I also have a "bone in my throat" on the subject that will not quite go down or up. I hope to have something put together and ready later today. As I often do with concurring opinions I write out, this one may not see the light of day.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

(dissent)

Chief Justice Burger, dissenting.

I dissent and agree generally with Mr. Justice Rehnquist's analysis. I cannot subscribe to the Court's unjustifiable narrowing of the rule of Terry v. Ohio, 392 U.S. 1 (1968). The Court would require a particularized and individualized suspicion that a person is armed and dangerous. This goes beyond the rationale of Terry and overlooks the practicalities of a situation which no doubt often confronts officers executing a valid search warrant. The Court's holding is but a continuance of the practical poverty of the judge-made exclusionary rule and its effect on the effort to police the narcotics traffic which takes such a terrible toll on human beings.

These officers had validly obtained a warrant to search a named person and the premises, a rather small, one room tavern, for narcotics. Upon arrival, they found the room occupied by twelve patrons. Were they to ignore these individuals and assume that all were unarmed and uninvolved, given the setting and the reputation of those who trade in narcotics it does not go too far to suggest that they might pay for it with their lives. The law does not require that those executing a search warrant must be so foolhardy. That is what Chief Justice Warren's opinion in Terry stands for. Indeed, the Terry Court

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

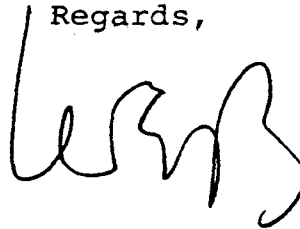
November 23, 1979

Re: 78-5937 - Ybarra v. Illinios

Dear Bill:

Please join me in your dissent. I have decided
also to publish one of my own.

Regards,

A handwritten signature in dark ink, appearing to be "WB", written in a cursive, stylized manner.

Mr. Justice Rehnquist

Copies to the Conference

To: Mr. Justice Brandeis
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____
Re-circulated: _____

1st PRINTED DRAFT

NOV 23 1979

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, | On Appeal for the Appellate
v. | Court of Illinois for the
State of Illinois. | Second District.

[November —, 1979]

MR. CHIEF JUSTICE BURGER, ^{join} [dissenting.

with whom Mr. Justice Rehnquist

I agree generally with Mr. JUSTICE REHNQUIST's analysis, ^{since}
and I, too, dissent. I cannot subscribe to the Court's unjusti-
fiable narrowing of the rule of *Terry v. Ohio*, 392 U. S. 1
(1968). The Court would require a particularized and indi-
vidualized suspicion that a person is armed and dangerous as a
condition to a *Terry* search. This goes beyond the rationale
of *Terry* and overlooks the practicalities of a situation which
no doubt often confronts officers executing a valid search war-
rant. The Court's holding is but another manifestation of the
practical poverty of the judge-made exclusionary rule. "The
suppression of truth is a grievous necessity at best, more
especially when as here the inquiry concerns the public in-
terest; it can be justified at all only when the opposed private
interest is supreme." *McMann v. S. E. C.*, 87 F. 2d 377, 378
(CA2 1937) (L. Hand, Cir. J.). Here, the Court's holding
operates as but a further hindrance on the already difficult
effort to police the narcotics traffic which takes such a terrible
toll on human beings.

These officers had validly obtained a warrant to search a
named person and a rather small, one-room tavern for narcotics.
Upon arrival, they found the room occupied by 12 persons.
Were they to ignore these individuals and assume that all
were unarmed and uninvolved? Given the setting and the
reputation of those who trade in narcotics, it does not go too
far to suggest that they might pay for such an easy assump-
tion with their lives. The law does not require that those ex-

CHANGES AS MARKED:

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: NOV 26 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, } On Appeal for the Appellate
v. } Court of Illinois for the
State of Illinois. } Second District.

[November —, 1979]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

I join MR. JUSTICE REHNQUIST's dissent since I cannot subscribe to the Court's unjustifiable narrowing of the rule of *Terry v. Ohio*, 392 U. S. 1 (1968). The Court would require a particularized and individualized suspicion that a person is armed and dangerous as a condition to a *Terry* search. This goes beyond the rationale of *Terry* and overlooks the practicalities of a situation which no doubt often confronts officers executing a valid search warrant. The Court's holding is but another manifestation of the practical poverty of the judge-made exclusionary rule. "The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *McMann v. S. E. C.*, 87 F. 2d 377, 378 (CA2 1937) (L. Hand, Cir. J.). Here, the Court's holding operates as but a further hindrance on the already difficult effort to police the narcotics traffic which takes such a terrible toll on human beings.

These officers had validly obtained a warrant to search a named person and a rather small, one-room tavern for narcotics. Upon arrival, they found the room occupied by 12 persons. Were they to ignore these individuals and assume that all were unarmed and uninvolved? Given the setting and the reputation of those who trade in narcotics, it does not go too far to suggest that they might pay for such an easy assumption with their lives. The law does not require that those ex-

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 30, 1979

RE: No. 78-5937 Ybarra v. Illinois

Dear Potter:

I agree.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens
Mr. Justice Souter

From: Mr. Justice Stewart

Circulated: 29 OCT 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, | On Appeal for the Appellate
v. | Court of Illinois for the
State of Illinois. | Second District.

[October —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

An Illinois statute authorizes law enforcement officers to detain and search any person found on premises being searched pursuant to a search warrant to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant.¹ The question before us is whether the application of this statute to the facts of the present case violated the Fourth and Fourteenth Amendments.

I

On March 1, 1976, a Special Agent of the Illinois Bureau of Investigation presented a "Complaint for Search Warrant" to a judge of an Illinois Circuit Court. The Complaint recited that the Agent had spoken with an informant known to the police to be reliable and:

"3. The informant related . . . that over the weekend of 28 and 29 February he was in the [Aurora Tap Tavern, located in the city of Aurora, Illinois] and observed fif-

¹ The statute in question is Ill. Rev. Stat., ch. 38, § 108-9 (1975), which provides in full:

"In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

"(a) To protect himself from attack, or

"(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

51-10015-1, 2, 4, 6

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Re-circulated: 11 OCT 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, } On Appeal for the Appellate
v. } Court of Illinois for the
State of Illinois. } Second District.

[October —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

An Illinois statute authorizes law enforcement officers to detain and search any person found on premises being searched pursuant to a search warrant, to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant.¹ The question before us is whether the application of this statute to the facts of the present case violated the Fourth and Fourteenth Amendments.

I

On March 1, 1976, a Special Agent of the Illinois Bureau of Investigation presented a "Complaint for Search Warrant" to a judge of an Illinois Circuit Court. The Complaint recited that the Agent had spoken with an informant known to the police to be reliable and:

"3. The informant related . . . that over the weekend of 28 and 29 February he was in the [Aurora Tap Tavern, located in the city of Aurora, Illinois] and observed fif-

¹ The statute in question is Ill. Rev. Stat., ch. 38, § 108-9 (1975), which provides in full:

"In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

"(a) To protect himself from attack, or

"(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

2
To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 13 NOV 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, } On Appeal for the Appellate
v. } Court of Illinois for the
State of Illinois. } Second District.

[October —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

An Illinois statute authorizes law enforcement officers to detain and search any person found on premises being searched pursuant to a search warrant, to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant.¹ The question before us is whether the application of this statute to the facts of the present case violated the Fourth and Fourteenth Amendments.

I

On March 1, 1976, a Special Agent of the Illinois Bureau of Investigation presented a "Complaint for Search Warrant" to a judge of an Illinois Circuit Court. The Complaint recited that the Agent had spoken with an informant known to the police to be reliable and:

"3. The informant related . . . that over the weekend of 28 and 29 February he was in the [Aurora Tap Tavern, located in the city of Aurora, Illinois] and observed fif-

¹ The statute in question is Ill. Rev. Stat., ch. 38, § 108-9 (1975), which provides in full:

"In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

"(a) To protect himself from attack, or

"(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 30, 1979

Re: No. 78-5937 - Ybarra v. Illinois

Dear Potter,

Please join me.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 8, 1979

Re: No. 78-5937 - Ybarra v. Illinois

Dear Potter:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 1, 1979

Re: 78-5937 - Ybarra v. Illinois

Dear Bill:

Please join me in your dissent.

Sincerely,

H.A.B.

Mr Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 26, 1979

Re: No. 78-5937 - Ybarra v. Illinois

Dear Chief:

Would you please join me in your additional dissenting opinion.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

October 30, 1979

78-5937 Ybarra v. Illinois

Dear Potter:

If we can resolve one small problem, I will be happy to join your opinion.

There are situations where I think perhaps all of us would agree that police, on the basis of a proper warrant, could search everyone in a particular place without an individualized warrant.

Examples include a place used by "pushers" to pick up their quota of heroin; an unlicensed gambling operation; a place that "fences" stolen goods; house of prostitution; etc.

Although your opinion is narrowly written, it may be prudent to make clear that this is not the kind of case mentioned above. Indeed, it seems to me that at least arguably the last sentence in note 4 (page 6) might be construed as precluding the search of anyone in the absence of an individualized showing of probable cause.

What would you think of substituting for that sentence something along the following lines:

"The warrant for the Aurora Tap Tavern provided no basis for departing from the usual rule that a warrant to search a place does not authorize a search of unnamed individuals in that place. Consequently, we need not consider situations where the search of unnamed persons in a place may be justified pursuant to a warrant stating probable cause to believe that persons who frequent the

place do so with the purpose of engaging therein in specified criminal activity."

Sincerely,

Mr. Justice Stewart

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 1, 1979

78-5937 Ybarra v. Illinois

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 16, 1979

Re: No. 78-5937 - Ybarra v. Illinois

Dear Chief:

I would be glad to try my hand at a dissent in this case. I know that you, Harry, and I all think it is an important one, and will try to do justice to it.

Sincerely,



The Chief Justice

Copy to Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 29, 1979

Re: No. 78-5937 - Ybarra v. Illinois

Dear Potter:

In due course, I will circulate a dissent in this case.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

30 OCT 1979

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, } On Appeal for the Appellate
v. } Court of Illinois for the
State of Illinois. } Second District.

[November —, 1979]

MR. JUSTICE REHNQUIST, dissenting.

On March 1, 1976, agents of the Illinois Bureau of Investigation executed a search warrant in the Aurora Tap in Aurora, Ill. The warrant was based on information given by a confidential informant who said that he had seen heroin on the person of the bartender and in a drawer behind the bar on at least ten occasions. Moreover, the informant advised the affiant that the bartender would have heroin for sale on March 1. The warrant empowered the police to search the Aurora Tap and the person of "Greg," the bartender.

When police arrived at the Aurora Tap, a drab, dimly lit tavern, they found about a dozen or so persons standing or sitting at the bar. The police announced their purpose and told everyone at the bar to stand for a pat-down search. Agent Jerome Johnson, the only officer to testify in the proceedings below, explained that the initial search was a frisk for weapons to protect the officers executing the warrant. Johnson frisked several patrons, including petitioner Ybarra. During this pat-down, Johnson felt "a cigarette package with objects in it" in Ybarra's front pants pocket. He finished frisking the other patrons, and then returned to Ybarra. At that time, he frisked Ybarra once again, reached into Ybarra's pocket, and removed the cigarette package that he had felt previously. The package, upon inspection, confirmed the officer's previously aroused suspicion that it contained not cigarettes but packets of heroin.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

see pages 4, 5

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

2nd
~~1st~~ DRAFT

From: Mr. Justice Rehnquist

Circulated: _____

SUPREME COURT OF THE UNITED STATES dated: 13 NOV 1979

No. 78-5937

Ventura E. Ybarra, Appellant, | On Appeal for the Appellate
v. | Court of Illinois for the
State of Illinois. | Second District.

[November —, 1979]

MR. JUSTICE REHNQUIST, dissenting.

On March 1, 1976, agents of the Illinois Bureau of Investigation executed a search warrant in the Aurora Tap in Aurora, Ill. The warrant was based on information given by a confidential informant who said that he had seen heroin on the person of the bartender and in a drawer behind the bar on at least ten occasions. Moreover, the informant advised the affiant that the bartender would have heroin for sale on March 1. The warrant empowered the police to search the Aurora Tap and the person of "Greg," the bartender.

When police arrived at the Aurora Tap, a drab, dimly lit tavern, they found about a dozen or so persons standing or sitting at the bar. The police announced their purpose and told everyone at the bar to stand for a pat-down search. Agent Jerome Johnson, the only officer to testify in the proceedings below, explained that the initial search was a frisk for weapons to protect the officers executing the warrant. Johnson frisked several patrons, including petitioner Ybarra. During this pat-down, Johnson felt "a cigarette package with objects in it" in Ybarra's front pants pocket. He finished frisking the other patrons, and then returned to Ybarra. At that time, he frisked Ybarra once again, reached into Ybarra's pocket, and removed the cigarette package that he had felt previously. The package, upon inspection, confirmed the officer's previously aroused suspicion that it contained not cigarettes but packets of heroin.

change on page 1

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

2nd DRAFT

Circulated: 14 NOV 19

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, } On Appeal for the Appellate
v. } Court of Illinois for the
State of Illinois. } Second District.

[November —, 1979]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, dissenting.

On March 1, 1976, agents of the Illinois Bureau of Investigation executed a search warrant in the Aurora Tap in Aurora, Ill. The warrant was based on information given by a confidential informant who said that he had seen heroin on the person of the bartender and in a drawer behind the bar on at least ten occasions. Moreover, the informant advised the affiant that the bartender would have heroin for sale on March 1. The warrant empowered the police to search the Aurora Tap and the person of "Greg," the bartender.

When police arrived at the Aurora Tap, a drab, dimly lit tavern, they found about a dozen or so persons standing or sitting at the bar. The police announced their purpose and told everyone at the bar to stand for a pat-down search. Agent Jerome Johnson, the only officer to testify in the proceedings below, explained that the initial search was a frisk for weapons to protect the officers executing the warrant. Johnson frisked several patrons, including petitioner Ybarra. During this pat-down, Johnson felt "a cigarette package with objects in it" in Ybarra's front pants pocket. He finished frisking the other patrons, and then returned to Ybarra. At that time, he frisked Ybarra once again, reached into Ybarra's pocket, and removed the cigarette package that he had felt previously. The package, upon inspection, confirmed the officer's previously aroused suspicion that it contained not cigarettes but packets of heroin.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

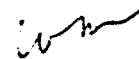
November 23, 1979

Re: No. 78-5937 - Ybarra v. Illinois

Dear Chief:

Please join me in your separate dissent in this case.

Sincerely,



The Chief Justice

Copies to the Conference

Pp. 1, 6

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 26 NOV 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, } On Appeal for the Appellate
v. } Court of Illinois for the
State of Illinois. } Second District.

[November —, 1979]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE
and MR. JUSTICE BLACKMUN join, dissenting.

On March 1, 1976, agents of the Illinois Bureau of Investigation executed a search warrant in the Aurora Tap in Aurora, Ill. The warrant was based on information given by a confidential informant who said that he had seen heroin on the person of the bartender and in a drawer behind the bar on at least ten occasions. Moreover, the informant advised the affiant that the bartender would have heroin for sale on March 1. The warrant empowered the police to search the Aurora Tap and the person of "Greg," the bartender.

When police arrived at the Aurora Tap, a drab, dimly lit tavern, they found about a dozen or so persons standing or sitting at the bar. The police announced their purpose and told everyone at the bar to stand for a pat-down search. Agent Jerome Johnson, the only officer to testify in the proceedings below, explained that the initial search was a frisk for weapons to protect the officers executing the warrant. Johnson frisked several patrons, including petitioner Ybarra. During this pat-down, Johnson felt "a cigarette package with objects in it" in Ybarra's front pants pocket. He finished frisking the other patrons, and then returned to Ybarra. At that time, he frisked Ybarra once again, reached into Ybarra's pocket, and removed the cigarette package that he had felt previously. The package, upon inspection, confirmed the officer's previously aroused suspicion that it contained not cigarettes but packets of heroin.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

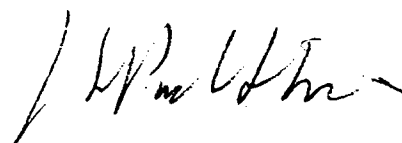
October 30, 1979

Re: 78-5937 - Ybarra v. Illinois

Dear Potter:

Please join me.

Respectfully,



Mr. Justice Stewart

Copies to the Conference