

Legal System Struggles With How to React When Police Officers Lie

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It's one of the most common accusations by defendants and defense attorneys — that police officers don't tell the truth on the witness stand.

Of course, defendants themselves can be the ones lying, but the problem of police perjury — and what can be done about it — is being debated anew. Fueling the discussion are recent court cases in New York City and Boston that indicated officers may have lied and a U.S. Supreme Court ruling this month that could have broader implications for cases in which improperly obtained evidence is in dispute.

Questionable testimony by police comes up most often in firearm- or drug-possession cases in which officers often testify that a defendant had a bulge in his pocket — which they thought might be a gun — or dropped drugs in plain sight as they approached him, giving the officers the right to seize the contraband. Defense lawyers say in many of these cases, officers are “testilying” and that the guns or drugs were actually discovered when their clients were unjustly frisked by officers. They also say testilying frequently occurs in more serious cases.

In Boston, a federal judge last week ruled that a police officer there falsely testified at a pretrial hearing in a gun-possession case about the circumstances of the defendant's arrest. The judge, Mark Wolf, is considering sanctions against the prosecutor for not immediately disclosing that the officer's testimony contradicted what he told prosecutors beforehand.

A federal judge in Brooklyn, N.Y., last fall ruled that a U.S. marshal and a New York City police officer lied when they testified that a defendant dropped two bags of drugs in front of them and then invited the officers to his apartment, where he revealed a large cache of cocaine.

Though few officers will confess to lying — after all, it's a crime — work by researchers and a 1990s commission appointed to examine police corruption shows there's a tacit agreement among many officers that lying about how evidence is seized keeps criminals off the street.

To stem the problem, some criminal-justice researchers and academic experts have called for doing polygraphs on officers who take the stand or requiring officers to tape their searches.

A Supreme Court ruling this month, however, suggests that a simpler, though controversial, solution may be to weaken a longstanding part of U.S. law, known as the exclusionary rule. The 5-4 ruling in *Herring v. U.S.* that evidence obtained from certain unlawful arrests may nevertheless be used against a criminal defendant could indicate the U.S. is inching closer to a system in which officers might not be tempted to lie to prevent evidence from being thrown out.

Criminal-justice researchers say it's difficult to quantify how often perjury is being committed. According to a 1992 survey, prosecutors, defense attorneys

and judges in Chicago said they thought that, on average, perjury by police occurs 20% of the time in which defendants claim evidence was illegally seized.

“It is an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers,” though it’s difficult to detect in specific cases, said Alex Kozinski, a federal appeals-court judge, in the 1990s. That’s because the exclusionary rule “sets up a great incentive for...police to lie.”

Police officers don’t necessarily agree, says Eugene O’Donnell, a former police officer and prosecutor who teaches law and police studies in New York. “Perjury is endemic in the court system, but officers lie less than defendants do because generally they aren’t heavily invested in the outcome of the cases,” he says.

Testilying may have taken off after a 1961 Supreme Court decision boosted the exclusionary rule by requiring state courts to exclude — or throw out — some evidence seized in illegal searches, such as when police frisk people without probable cause or search a residence without a warrant.

Immediately after the decision, *Mapp v. Ohio*, studies showed that the number of annual drug arrests in the U.S. — most cases are prosecuted in state court — didn’t change much but there was a sharp increase in officers claiming that suspects dropped drugs on the ground. “Either drug users were suddenly dropping bags all over the place or the cops were still frisking but saying the guy dropped the drugs,” says John Kleinig, a professor at John Jay College of Criminal Justice.

This month’s Supreme Court decision added an exception to the exclusionary rule by holding that the prosecution of an Alabama man for drug- and firearm-possession charges was valid, even though the contraband was found after the man was wrongly arrested and searched. Police officers had mistakenly thought he was subject to an arrest warrant.

Throwing out evidence because of wrongful searches and arrests “is not an individual right and applies only where its deterrent effect outweighs the substantial cost of letting guilty and possibly dangerous defendants go free,” wrote Chief Justice John Roberts.

Civil liberties advocates and defense lawyers say losing the exclusionary rule would harm the public. “We’d risk far greater invasions of privacy because officers would have carte blanche to do outrageous activity and act on hunches all the time,” says JaneAnne Murray, a criminal defense lawyer in New York.