Journal of Criminal Law and Criminology

Volume 6 | Issue 2 Article 9

1915

Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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ABDUCTION.

State v. Wood, La., 67 So. 542. *To another State.* Defendant was convicted under a statute making it a crime to abduct or entice any woman of previous chaste character for the purpose of prostitution. The evidence showed that the defendant induced the prosecutrix to leave her home in Louisiana, and go to Texas. That the defendant procured a marriage license but the Catholic priest refused to perform the ceremony during Lent. The defendant offered to be married by a justice of the peace. The prosecutrix refused this offer but cohabited with defendant. Defendant objected to the introduction of evidence as to certain promises made in Texas, but the evidence was received. Defendant contented that the verdict was not supported by the evidence and claimed that the crime charged was now within the exclusive jurisdiction of the Federal Government. As some other promises were made in Louisiana, before the prosecutrix went to Texas, the crime was complete in that state, and the evidence of subsequent happenings in Texas was admissible to show the purpose for which the prosecutrix was enticed from Louisiana. Hence the evidence was properly admitted. While the trial court might have set the verdict aside on the ground that the defendant's guilt was not established beyond a reasonable doubt, the appellate court could not do so as the constitution of the state limits its jurisdiction to questions of law alone. Whether the verdict of the jury is supported by the evidence is a question of fact. The federal law is not in conflict with the state law, and in so far as they might be directed against the same evils they are easily reconciled. Hence the conviction was affirmed.

ASSAULT AND BATTERY.

State v. Schutte, 93 Atl., 112 N. J. *Assault with an automobile.* A criminal assault may be committed with an automobile driven along a public street at an excessive rate of speed that endangers the safety of other persons and actually results in such injury. The driving of an automobile at an excessive rate of speed is a willful act likely to inflict injury from which malice and intention to inflict injury, which are the essentials of a criminal assault, may, if the circumstances so warrant, be implied.

CHANGE OF VENUE (FROM JOHN LISLE).

Commonwealth v. March, 248 Pa., 434, A. R. 28 May, 1915. Change of venue is a matter largely within the discretion of the trial court and when the application is refused an appellate court will only interfere where the facts disclose an abuse of discretion.

Where a petition for a change of venue was filed and there was an argument of counsel thereon but no facts were proved to show the court that the accused could

not have a fair and impartial trial in the jurisdiction where the crime was committed, and there was nothing to show the existence of such passion or prejudice as would prevent the jury from rendering a true verdict under the evidence, the petition was properly refused.

It is not error for the court to permit a defendant to be tried upon one indictment because another indictment, found by a previous grand jury for the same offense, is undisposed of at the time of the trial.

The action of the trial judge in refusing to sustain challenges of jurors for cause will be reversed only in case of palpable error.

In a homicide case where the defendant objects to the competency of a certain witness on the ground that she was his wife, which she denied, an assignment of error based on the fact that certain witnesses identified another woman present in the court room as the wife of the defendant will be disregarded where no objections were made to the questions when asked such witnesses, and no exceptions were taken to the rulings of the trial judge in this respect, and especially where it appeared that no harm was done the defendant by such identification.

In such case it was not error for the court to permit such witness to testify, when it appeared that the lawful wife of the defendant was living, and that the witness was not at the time of the trial nor at any other time his wife. The question of the competency of such witness was for the trial judge and where he submitted it to the jury as a question of fact, thus giving the defendant the benefit of whatever doubt there might have been in the mind of the jurors as to his marriage relations, the defendant could have no cause of complaint.

Where the record on appeal in a homicide case showed that every step taken in the presentation and trial of the defendant was in the Court of Oyer and Terminer, but by a clerical error the docket entries showed a certification from the Oyer and Terminer to the Quarter Sessions, it was not error for the lower court to amend the record in accordance with the facts.

COMPLAINT.

State v. Flannery, Mo., 173 S. W. 1053. *Need not be technically accurate.* Defendant was arrested on a warrent issued upon a complaint which charged that he had "willfully, unlawfully, and feloniously, killed Olin Connell by striking him on the head with his fist." The name of deceased was Olin McConnell. The defendant was arrested and brought before the committing magistrate later in the same day on which the crime was committed. He asked a postponement of the preliminary examination, which was granted. Before the time fixed for that examination, he appeared with counsel, waived examination, and was bound over for trial. An information charging murder in the second degree was filed. He moved to quash this because (1) no complaint had been filed charging a felony; (2) the name of the deceased was not properly stated; (3) he had thus been deprived of a preliminary examination. The motion was denied, he was indicted and convicted of manslaughter, and appealed. Walker, J., held that (1) as complaints are ordinarily made by laymen they need not conform to the rules of criminal pleading. This one sufficiently charged manslaughter. (2) The defendant knew the nature of the charge, the time when and the place where it was committed. The misnomer could not be prejudicial. (3) He waived the right to a preliminary examination.

"Courts should not lend themselves to subterfuges as defenses to criminal prosecution where not even an indication of prejudice is made. The time has passed, not only in this state, but elsewhere when pure technicalities, in the absence of

evidence of well defined injury to the accused will prevent the enforcement of the criminal law."

The majority of the court appeared to think that if the defendant had insisted upon a preliminary examination, he should have been discharged at that examination because of the defects in the complaint. But they concurred in the result reached by Walker, J., on the ground that defendant had waived the defects in the complaint by waiving the right to a preliminary examination. The judgment was affirmed.

CONSPIRACY.

United States v. Aczel, 219 Fed. 917. Conspiracy affecting right to vote under statute making senatorship subject to popular vote.

Under Const. Art. 1, sec. 2, providing that the House of Representatives shall be composed of members chosen by the people of the several states, and the electors in each state shall have the qualifications of the electors of the most numerous branch of the state legislature, and Const. Amend. 17, making similar provisions as to United States Senators, and Act June 4, 1914, providing for election of United States Senators by direct vote of the people, the election to be conducted as near as may be in accordance with the laws of the state regulating the nomination and election of Representatives, the right to vote for Representatives in Congress and United States Senators, and to serve as members of the election boards where such Representative or Senator is to be elected, are rights secured by the constitution and laws of the United States, within Criminal Code, sec. 19, making punishable a conspiracy to deprive any citizen of any right or privilege secured to him by the constitution and laws of the United States.

CONSTITUTIONAL LAW.

State v. Pay, Utah, 146 Pac. 300. *Preliminary examination.* The state constitution provided that offences "shall be prosecuted by information after examination and commitment by a magistrate," unless the accused waives examination. A statute made it the duty of the district attorney, when a defendant had been examined and committed, to file an information "charging the defendant with the offence for which he is held to answer, or any other offence disclosed by the testimony, whether it be the offence charged in the complaint on which the examination was held or not." Defendant was examined on a complaint charging larceny of some sheep. The magistrate held that the evidence did not show that larceny had been committed but that the defendant had changed their ear marks with intent to steel the sheep, and committed the defendant for trial upon the latter charge. The district attorney filed an information pursuant to the commitment. The defendant moved to quash it upon the ground that he was neither given nor had waived a preliminary examination upon the charge made in the information. The motion was denied and the defendant was tried, convicted, and he appealed. Held that the constitution gave the defendant a right to a preliminary examination upon the charge upon which he is committed for trial, and that there was not sufficient examination in this case. Defendant is entitled to be informed of the charge at the hearing, and to have the complaint read before he is called on to choose counsel to waive examination. When the state bound him over on a charge not contained in the complaint he lost the benefit of counsel as well as the right to waive examination upon the charge upon which he was actually committed. The magistrate should have had a new complaint prepared charging the offence disclosed by the evidence and giving him an opportunity to either waive or insist upon examination, and to procure counsel, if he desired to do so. The defendant had not waived this right. The statute permitting

the district attorney to file an information charging any other offence disclosed by the testimony must be restricted to other offences included in the original complaint. The judgment was reversed, and the cause remanded with directions to quash the indictment, and, if the district judge is so advised, to direct the filing of a proper complaint against the defendant, upon which the usual proceedings should be held.

PRELIMINARY EXAMINATION.

People v. Ronsse, Cal., App., 146 Pac. 65. *Before unauthorized person.* As the result of a preliminary examination defendant was bound over for trial in the superior court, on an information in legal form. After pleading not guilty in the superior court defendant asked leave to withdraw his plea that he might move to set the information aside. He presented no reasonable excuse for having failed to make such a motion before filing his plea. The trial court denied his request. At the trial he objected to the jurisdiction of the superior court because the person who acted as justice of the peace and commiitted him for trial was not a magistrate but was only a pretended incumbent of a pretended office. He made the same objection after verdict. A statute provided that if a motion was not made to set aside an information the defendant was precluded from afterward raising any objection that was a ground for such motion. Held, that it was no abuse of discretion for the trial court to refuse to permit him to withdraw his plea and that as he had pleaded, the objection to the preliminary examination came too late. The conviction was affirmed.

SECOND OFFENCE.

State v. Legg, 93 Atl. 556. Dela. Where second conviction is for an offence prior to first conviction.

Accused, after being convicted of selling liquor to a minor, was again indicted for a like offence. The sale charged by the second indictment occurred prior to the sale for which accused was first convicted. Held, that she could not be punished under Rev. Code 1915, sec. 165, prohibiting the sale of liquor to minors and providing that a second conviction shall work a forfeiture of the license.

SUNDAY.

Moss v. State, Tenn., 173 S. W. 859. *Jury instructed.* On a trial for murder the argument of counsel was finished at 11:30 P. M. Saturday night. No formal adjournment was taken but the sheriff was directed to bring the jury into court the next morning, and the court took a recess. The court instructed the jury Sunday morning and they returned a verdict apparently on Monday. The defendant was convicted and sentenced to imprisonment for life. His motion for a new trial was overruled and he appealed. Held, that a canon of A. D. 517, which forbade the adjudication of causes on Sunday was received and adopted by the Saxon Kings of England, and confirmed by William the Conqueror and by Henry II, thus becoming a part of the English common law. This rule became a part of the common law of Tennessee and has not been changed by statute. Under it ministerial acts may be done on Snnday but not judicial acts. Charging the jury is a judicial function. Such error is not cured by the statute requiring appellate courts to overlook mere irregularities and technical objections. The conviction was reversed.

TRIAL.

Agee v, State, Ala., 67 So. 411. *Separate trial, joint conviction.* Agee and

Kitchen were jointly indicted for murder. On motion they were granted separate trials. At the day fixed for the trial of Agee, he was tried by a jury on a plea of not guilty. The jury returned a verdict finding both Agee and Kitchen guilty of murder in the first degree, and the court entered judgment pursuant to the verdict. Both defendants appealed asking a reversal of judgment on the ground that they were unlawfully tried jointly. Held, that as Kitchen had been convicted without a trial the judgment must be reversed as to him. The gratuitous interjection of Kitchen's name into the verdict and judgment could not prejudice Agee so the judgment was affirmed as to him.

State v. Clary, La., 67 So. 376. *Misconduct of Jury.* On a trial for murder the defendants were convicted of manslaughter. They appealed from the order of the trial court denying a new trial on the ground that the jury was not kept free from improper influences. The jury was kept together during the trial in charge of two or more bailiffs. They were lodged at a hotel and at their meals were allowed to converse freely with the waitresses, and could hear conversation at the other tables. They were taken twice to moving picture shows with the permission of the trial judge, and sat in the ordinary rows of chairs with the rows in front and back of them occupied, in the obscurity which usually prevails in cases of that kind. In going to and from the court room and these shows, they marched along more or less crowed sidewalks. On one occasion a stranger conversed with one of the jurors. Packages and valises were allowed to be given to them with but slight examination of their contents, and a few notes were received by some of the members. There was strong public sentiment against the defendants. The appellate court were at first of the opinion that these facts vitiated the verdict. "They were accessible, misconduct is presumed." On rehearing the jurors testified that no improper influence was exercised upon them, and a majority of the court thought the presumption of misconduct was fully answered by the verdict being for manslaughter rather than for murder, and affirmed the conviction.

WHITE SLAVE ACT.

Welsch v. United States, 220 Fed., 764. When transportation is for an immoral purpose.

On trial for persuading and enticing a girl, with whom accused sustained immoral relations, to go from one state to her home in another state for immoral purposes, an instruction that if accused furnished the transportation to the girl solely at the instance of the girl's aunt, because she wanted her to return home, and if he was simply a messenger to convey that and furnish the transportation, and had no other or further intent, he should be found not guilty, but that, if he had the further purpose and intent after she was transported to her home to renew sexual intercourse with her, he should be found guilty, was misleading, if not erroneous, as the jury might have understood therefrom that accused was guilty, however, free his words and acts from persuasion or inducement, if he had the secret intention of profiting unlawfully by the girl's return home, especially as the verdict acquitting accused of the charges of transporting and aiding in transporting the girl, and convicting him of unlawful persuasion, was inconsistent and indicated that the jury was confused as to the law.

Digg v. United States, 220 Fed. 545. Transportation for purposes other than commercialized vice.

The immorality denounced by the White Slave Traffic Act (Comp. St., 1913, sec. 8813), prescribing the punishmant for knowingly transporting any woman or girl in interstate commerce for the purpose of prostitution or debauchery, or

for any other immoral purpose, is not limited to commercialized vice, and the act applies to transportation for the purpose of making a girl the concubine or mistress of the person transporting her.

Malloy v. South Carolina. 35 Sup. Ct. Reptr. 507. Substitution of electrocution for hanging after conviction. Ex post facto laws.

The change in the punishment for murder, made by S. Car. act Feb. 17, 1912, from death by hanging within the county jail or its encloseure, in the presence of specified witnesses, to electrocution within the penitentiary, in the presence of an increased number of invited witnesses, does not render the statute repugnant to U. S. Const. Art. 1, sec 10, as being ex post facto when applied to crimes previously committed.

ENTRAPMENT.

State v. Dougherty, 93 Atl., 98 N. J. Accepting bribe to replace the Atlantic City "Board Walk" with concrete.

Where, to discover municipal corruption, members of the city council were offered bribes to pass an ordinance which was never intended to be carried out, the councilmen having passed the ordinance and accepted the bribes, cannot defend in an indictment for conspiracy on the ground of entrapment.

ERROR WITHOUT PREJUDICE.

Antrey v. State, Ala., 67 So. 237. *Exclusion of evidence.* On the trial of an indictment for murder, the court excluded evidence of a statement made by the deceased, which was offered by the defendant. Held, in the absence of a showing that what the deceased said was in some way relevant to the issue of the case, the exclusion of this question could not be pronounced erroneous.

People v. Walker, Cal. App., 146 Pac. 65. *Confession corroborated by defendant's testimony.* On a trial for murder the court admitted evidence of a so-called confession by the defendant that he fired the shots which killed the deceased but claimed that he was acting in self defence. At the trial he testified to the same effect. Held, that while the record showed the alleged confession was not free and voluntary, but was extorted by fear, intimidation and improper influence, the error in admitting it was without prejudice to defendant's substantial rights, as he made the same admission at the trial. Judgment of imprisonment for life was affirmed.

EXPERT TESTIMONY.

People v. Risley, 108 N. E. 200 N. Y. Testimony of the mathematical probabilities by a university professor.

In a prosecution for offering in evidence as genuine a document, knowing that same had been fraudulently altered by the insertion of certain typewritten words, a university professor was improperly permitted to testify that by the application of the law of mathematics, the chance of the same defects, as were shown by the inserted words, being produced by another typewriter, was so small as practically to be a negative quanity, where his statement was not based on actual observation but was purely speculative.

FALSE PRETENSES.

People v. Cronkrite. 107 N. E. 703 Illinois. *Variance in indictment and proof.* On indictment charging that accused obtained from J. a large sum of money,

goods and personal property, to wit, $400 lawful money of the United States by means of a confidence game, was not supported by proof that accused obtained from J. a check for $400, which he afterwards cashed, as he obtained no money from J.

FORMER JEOPARDY.

State v. Rodgers, S. C., 84 S. E. 304. *Two crimes in the same transaction.* The evidence showed that the defendant, with others, went to the house of one Young. The door was partly ajar and defendant shot Young, who fell from his chair to the floor. He attempted to rise and defendant struck him on the head with an axe. Defendant immediately turned his body over, removed some money from his pocket, and then took a fire shovel and scattered coals of fire over and around the body and on the bed nearby, setting fire to the house, which burned down. The defendant was tried and convicted of murder, and on a recommendation to mercy, sentenced to the pententiary for life. Defendant was then indicted for burning the dwelling house of said Young, convicted and sentenced to death. In the trial for arson the state used practically the same witnesses as at the trial for murder and the testimony was practically the same. After conviction defendant moved in arrest of judgment (1) on the ground of former jeopardy (2) because the same facts and testimony were used in both trials, (3) because a series of charges shall not be preferred out of the same facts, (4) because the facts shown at the first trial would have warranted and did sustain a conviction, on the indictment for arson. Held, that as the defendant could not under any circumstances have been convicted of arson in the trial under the indictment for murder, he had not been in jeopardy for the offence of arson. The fact that he was undergoing punishment for the crime of murder will not prevent execution of the sentence of death for the crime of arson. The offences though arising out of the same state of facts were separate and distinct.

It was further objected that there was no testimony proving that the defendant burned the dwelling house of Young, because Young was dead when the arson was committed. Held, that there was no error in overruling this objection as the evidence did not show that Young had died from his injuries when the defendant set fire to the house.

Schulman v. State, Tex., Crim. App., 173 S. W. 1195. *Waiver of jury trial.* Defendant was on trial for a misdemeanor. After three witnesses had been examined, a juror was excused because his child was sick, defendant's counsel agreeing that they would try the case before the remaining five jurors. The court announced that he would discharge the rest of the jurors, and did so in spite of defendant's objection. Later he was put on trial before another jury, his plea of former jeopardy was not even submitted to the jury, and he was convicted and appealed. Held, that while the state cannot waive a juror the defendant can, and has the right to agree to a trial by less than six jurors. Defendant was in jeopardy under these facts, and could not be retired. The conviction was reversed.

People ex rel. Bullock v. Hayes, Warden, 151 N. Y., Supp. 1075. Where the relator was tried under an indictment for manslaughter and the jury disagreed, being discharged without his consent, though also without objection, and he was indicted on the same facts for murder the second indictment is valid, and he may be tried on it, since where the court lacks jurisdiction, or the indictment is too defective to support a conviction, or the jury is discharged without a verdict, after disagreement continued during reasonable time for deliberation, there is no former jeopardy that may be pleaded in bar of a subsequent prosecution.

INDETERMINATE SENTENCE LAW.

Day v. Commenwealth, Ky., App., 173 S. W. 136. *Limits fixed by jury.* The indeterminate sentence law required the jury to state in their verdict the minimum and maximum limits of the term of imprisonment. Defendant was convicted of manslaughter and the jury, under an instruction that they should fix his penalty by imprisonment for a term of not less than two or more than twenty-one years, fixed it at twenty-one years, without fixing any minimum term. Held, that the instruction and the verdict were erroneous as the verdict did not conform to the statute. The judgment was reversed and a new trial granted.

Orange v. State, Tex., Crim. App., 173 S. W. 297. *Limits fixed by statute.* The defendant was convicted of murder, and sentenced to life imprisonment in the penitentiary. Under the indeterminate sentence law and the statute fixing the penalty for murder, the sentence should have been for not less than five years nor longer than his natural life. On appeal from the conviction, the appellate court ordered the judgment to be reformed to conform to the statute. Affirmed.

INTERSTATE EXTRADITION.

Ex parte Innes, Tex., Crim. App., 173 S. W. 291. *Involuntary presence in the state.* The relator went from Georgia to Oregon. There she was arrested and sent to Texas, upon the requisition of the governor of that state for trial upon a criminal charge. She was acquitted. While she was in jail in Texas, during the proceedings, the governor of Texas granted a requisition from the governor of Georgia. Upon her acquittal she was immediately arrested upon the requisition. A writ of habeas corpus was sued out and the court ordered her turned over to the Georgia authorities. She appealed. It was argued that the provision in the Federal Constitution that a person "who shall flee from justice *and be found* in another state," shall be delivered up, is not self executing. The Federal statute giving effect to this provision makes it the duty of the executive authorties of the state "to which such person has fled" to cause him to be arrested. If the defendant had not gone to Texas voluntarily that was not the state "to which she had fled," and the governor of that state had no authority to have her arrested under the requisition without first giving her an opportunity to leave the state. Held, that by analogy to the rule that a person extradited from another state for trial upon one charge may be tried upon a different charge, the relator could be legally surrendered to the Georgia authorities, under the Federal law. But the state of Texas had power to provide for extradition within its limits in cases not covered by the act of congress. The state statute provided for the extradition of a fugitive who should "be found in this state." The Georgia authorities found the relator in Texas, and hence the state statute applied. Judgment affirmed.

LARCENY.

Komito v. State, 107 N. E. 762, Ohio. *Sale by custodian.* Where goods are in the possession of the lawful owner, and a mere custodian, "storekeeper," or watchman takes them and removes them from the premises wrongfully, and sells the same without authority, such custodian, "storekeeper," or watchman is guilty of larceny, and any one receiving such goods, with full knowledge of the circumstances, is guilty of knowingly receiving stolen goods. The court said: "Courts sometimes indulge in an ethereal refinement between larceny and embezzlement that in practical operation very often nullifies the statutes. The only benefit accruing from such a policy results in the rather doubtful advantage of the criminal escaping his just punishment."