Journal of Criminal Law and Criminology

Volume 6 | Issue 3 Article 10

1915

Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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CONSTITUTIONAL LAW. *State v. Holloway*, New Mex., 146 Pac. 1066. *Change of venue.* Defendant was indicted for embezzlement. Upon motion of the state for a change of venue, the court transferred the trial to another county. Defendant was convicted and appealed. One ground of appeal was that the statute authorizing a change of venue on the application of the state violated the following provision of the state constitution: "In all criminal prosections the accused shall have the right * * * to a separate public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Held, that in view of the law on this subject prior to the adoption of the constitution, the right to be tried in the county in which the crime was committed is subject to the condition that an impartial jury can be obtained in that county. If an impartial jury can be obtained the state cannot have the venue changed without the consent of the accused. But if a jury cannot be obtained in the county that is not partial to the accused, the constitution does not give the accused the right to be tried by such partial jury but the state may have the venue changed without his consent.

Hyde v. State, Tenn., 174 S. W. 1127. *Sale of Opium.* A statute regulating the sale of opium and its compounds and derivatives allowed registered physicians to dispense or distribute such drugs, but only in the course of their professional practice to patients whom they were personally attending. On appeal from a conviction for violation of the statute, it was contended that the statute was in conflict with the fourteenth amendment of the federal constitution, in that it arbitrarily curtailed the right of a physician to practice by prescribing according to methods formerly obtaining. This it was contended deprived him of liberty of property without due process of law. Held, that in the exercise of the police power the legislature may regulate the sale and distribution of any drug of a poisonous nature, the use of which tends to debauch the public by forming a habit that undermines the physical, mental, and moral constitution of the users. The requirement that the physician shall personally attend the patient is reasonable since only by personal observation and diagnosis can he be sure that the drug is needed.

Collins v. Johnston, Warden. 35 Sup. Ct. Reptr. 649. *Equal protection of the laws.* The equal protection of the laws is not denied to a person sentenced to 14 years imprisonment for the crime of perjury, under the authority of Cal. Pen. Code, Sec. 126, which makes perjury punishable by imprisonment in the state prison for not less than one nor more than 14 years, altho five years imprisonment may be the average maximum penalty for other felonies denounced by Cal. laws, some of which may be of greater gravity and of more injurious consequences than perjury:

Commonwealth v. Zimmerman, 108 N. E. 893, Mass. *Chiropractice.* Rev. Laws, c. 76, sec. 8, providing that one not lawfully authorized to practice medicine and registered thereto, who holds himself out as a practicioner of medicine or practices or attempts to practice medicine in any of its branches, construed as including chiropractice, is constitutional, as a police enactment in the interest of public health and safety, not impairing the liberty of contract.

Nor is such statute, rendered unconstitutional as an unreasonable classification, denying the equal protection of the laws by the fact that sec. 9 exempts certain classes, such as osteopaths and pharmacists, and those practicing Christian Science, mind cure, massage, etc.

Fox v. State of Washington, 35 Sup. Ct. Reptr. 383. *Indefiniteness of criminal statute.*

A statute, which like Rem. & Bal. Code, sec. 2564, makes criminal the editing of printed matter tending to encourage and advocate disrespect for law, cannot be said to violate U. S. Const., 14th Amend., as being an unjustifiable restriction of liberty, and too indefinite for a criminal statute, where the highest state court, by implication at least, reads the statute as confined to encouraging an actual breach of the law, and in the case at bar has merely construed it as embracing an article encouraging and inciting a persistance in what would be a breach of the state laws against indecent exposure.

COLLEGES AND UNIVERSITIES.

Commonwealth v. New England College of Chiropractice, Inc. Mass., 108 N. E. 895. Rev. Laws c. 208, sec. 75, provides that whoever, without the authority of a special act granting the power to give degrees, confers or grants degrees as a school, college, or as a private individual, shall be punished. A college of chiropractice, not authorized by law to confer degrees, issued a diploma signed by its officers and faculty, all of whom wrote after their names "D. C.," standing for "Doctor of Chiropractice," stating that a student having completed the prescribed courses of study, and met all the requirements for graduation, had been declared a doctor of chiropractic. Held, that the diploma was a degree, which as used in the statute, is any academic rank recognized by colleges and unviersities having a reputable character as institutions of learning or any form of expression indicative of academic rank, so as to convey to the ordinary mind the idea of some collegiate, unviersity or scholastic distinction: that the word "Doctor" as a perfix to a person's name, signifies an academic distinction founded upon having received a degree, and, as commonly used, indicates skill in the general subject of medicine: that the word "chiropractic" has such a meaning that one practicing it may be found to be practicing medicine; and hence that defendant college was subject to the penalty.

BURGLARY.

People v. Toland, 151 N. Y., Supp. 482. *"Breaking out" of a building under statute.*

Breaking out of a building was not burglary at common law, and where defendant entered a barn through an open outer door and stole a heifer, and an accomplice closed the door through which they had entered while the heifer was being caught and killed, the opening of such door on leaving by the defendant or his accomplice would not constitute such a breaking out as is neccessary to constitute burglary under Penal Law, sec. 404, subd. 2. Kellogg and Woodward, J. J. dissenting.

EVIDENCE.

State v. Ruttberg, N. J., 93 Atl. 97. *Sexual incapacity.*

In a prosecution for fornication, the testimony of defendant's wife that, for several years prior to the alleged offense, he was physically incapable of sexual intercourse, was improperly excluded on an objection that sexual incapacity could be shown only by the testimony of a duly qualified physician.

FOOD AND DRUGS ACT.

U. S. v. American Laboratories, 222 Fed., 104. *Effect of the Sherley Amendment.*

The Sherley amendment (Act of August 23, 1912) to the Food and Drugs Act, punishing the making of false and fraudulent statements of the curative properties of medicines is within the power of Congress to enact, and while one may not be convicted thereunder merely because he advocates a theory of medicine which at the time has not received the sanction of the medical profession, yet one guilty of fraud may not escape conviction merely because some one may honestly believe in the theory he fraudulently sets forth, and the essential difference is one of fact for the jury.

FORMER JEOPARDY.

Hall v. State, Ala. App., 67 So. 739. *Refusal to receive verdict.* On a trial for homicide, the jury returned a verdict of guilt of manslaughter in the second degree and fixed the punishment at a fine of $25.00 and thirty days in prison at hard labor. The court refused to receive the verdict, instructed the jury that if they found the defendant guilty they could not find him guilty of less than manslaughter in the first degree; that they had not been instructed upon the offense of manslaughter in the second degree and that they should retire and further consider their verdict. The court gave them forms of verdicts, including the verdict of not guilty. The jury retired, and later returned a verdict of guilty of manslaughter in the first degree, fixing the punishment at imprisonment in the penitentiary for one year and one day. Judgment was entered upon the verdict and defendant appealed. There was no evidence that the defendant was guilty of manslaughter in the second degree. Held, that the verdict was an acquittal of the higher degrees of homicide. The court had no more legal power to refuse to receive that verdict than he would have had to receive a verdict of not guilty. Consequently the second verdict and the judgment upon it were invalid. The conviction was reversed and the case remanded for a new trial with the ruling that if the defendant should plead former jeopardy he could not be convicted of any higher offense than manslaughter in the second degree. The court suggested that if the trial judge had originally charged the jury that they could not find defendant guilty of a less offence than manslaughter in the first degree he might have power to refuse to receive a verdict rendered in positive violation of this instruction, but left the question open for decision when it should arise.

McCaskey v. State, Tex. Crim. App., 174 S. W. 338. *Variance.* Defendant was tried on an indictment charging that he had robbed one Burton of "one ten cent piece commonly known as one dime." The evidence showed that he robbed Burton of two five cent pieces. The state dismissed that case because of the variance between the charge and the proof. Defendant was then indicted for robbing Burton of "two five cent pieces of money commonly known as nickels," and pleaded former jeopardy. He was convicted and appealed. Held, that an acquittal upon the first charge could not and did not put him in jeopardy for the offence charged in the second indictment. Hence the trial court did not err in striking out the plea of former jeopardy. The conviction was affirmed.

GRAND JURY.

U. S. v. Philadelphia & R. Ry. Co., 221 Fed., 683. *Presence of special attroney as stenographer.*

Act June 30, 1906, providing that any attorney or counselor, specially appointed by the Attorney General, may conduct grand jury proceedings, does not authorize the appointment of an attorney, who was not intended to conduct the proceedings, but whose sole duty was to report stenographically the testimony of witnesses before the grand jury, and the presence of such person in the grand jury room during the taking of testimony is ground for quashing the indictment.

Hollars v. State, Md., 93 Atl., 970. *Error in name. Age of juror.*

A clerical error in the name of a grand juror, as drawn from the box, does not invalidate an indictment returned by the jury, where the juror who served was the one intended, and there was no showing that the defendant was in any way prejudiced by the error.

The requirement of the Code Pub. Civ. Laws, art. 51, sec. 1, that no person under 25 shall be selected as a grand juror is directory, and not mandatory, since there is no procedure provided by which the clerk can ascertain the ages of those placed on the jury lists, and where the name of a grand juror under 25 was placed on such list because of an honest mistake of the clerk, an indictment found by the grand jury is not thereby rendered invalid.

HABEAS CORPUS.

Frank v. Mangum, Sheriff of Fulton Co., Georgia, 35 Sup. Ct. Reptr. 582.

Federal interference with state administration of criminal law. Habeas Corpus will not issue out of the Federal Courts in behalf of a person in custody under a conviction of crime in a state court who asserts in his petition for the writ the existence at the trial of disorder, hostile manifestations and uproar, amounting to mob domination of court and jury, and hence a denial of the due process of law guaranteed by U. S. Const. 14th Amend., where such assertions are but repitions of allegations which the accused had a right to submit and did submit first to the trial court on motion for a new trial, and afterwards to the highest state court as a ground for avoiding the consequences of the trial, and where both courts having considered such allegations successively at times and places under circumstances wholly apart from the atmosphere of the trial and free from any suggestion of mob domination and the like, and having examined the facts, not only upon the affidavits and exhibits submitted in behalf of the prisoner, which are embodied in his petition for habeas corpus, but also upon rebutting affidavits submitted by the state, which for reasons not explained he has not included in such petition, found the allegations to be groundless except in a few particulars as to which the courts ruled they were irregularities not harmful to the defendant, and therefore insufficient in law to avoid the verdict. Hughes & Holmes, J. J., dissenting.

(NOTE.—Judgment of death has since been communted to life imprisonment by the retiring governor, John M. Slaton.)

ILLEGAL SEARCH.

Holloway v. State, Ga. App., 84 S. E. 590. *Evidence thereby obtained is inadmissable.* Where the only evidence that the defendant was carrying a concealed weapon was obtained through an unlawful assault made by an officer upon the defendant, in violation of the defendant's right of personal privacy, it was held that the trial court should have granted a new trial, since the constitution protects the defendant from incriminating evidence obtained by an illegal seizure and search of his person.

INDETERMINATE SENTENCE.

Harris v. Commonwealth, Ky. App., 174 S. W. 476. *Interval of one day.* The jury found the defendant guilty of grand larceny and fixed his punishment at confinement in the penitentiary for not less than one year nor more than one year and one day. One ground of appeal was that this verdict did not provide indeterminate punishment. Held, that as a maximum and a minimum limit was fixed the verdict and judgment were indeterminate within the meaning of the statute.

INDICTMENT AND INFORMATION.

Ware v. State, Ala., 67 So. 763. *Variance.* An indictment for robbery described various articles that were stolen, including "$5.00 lawful money of the United States of America, a particular description of which $5.00 is to the jury unknown." At the trial, the person who had been robbed described the other articles as they were described in the indictment, but said that the $5.00 was a five dollar bill and that he had so described it before the grand jury. The defendant was convicted, and one ground upon which he appealed was that there was a fatal variance between the description of the stolen property in the indictment and the proof at the trial, because the description of the $5.00 was known to the grand jury. Held, that as a general rule a conviction cannot be sustained on an indictment which avers that a fact is unknown to the grand jury, if it appears upon the trial that the fact was known to them. But this rule is confined to material facts. The indictment sufficiently identified the offence by a definite description of the other property taken, and a general description of the $5.00 as "lawfull money of the United States of America." The allegation that a further description of the $5.00 was unknown to the grand jury may be rejected as surplus age. If the indictment had charged the taking of only the $5.00, there would be merit in the defendants contention. But it charges the taking of other articles each of which is sufficiently described in the indictment. Hence the conviction was affirmed.

INSANITY.

Walters v. State, 108 N. E., 583 Ind. *Burden of proof.*

An instruction that the burden of proving insanity rests on accused, but that, while the burden rests on him to prove insanity, yet he need not prove it beyond a reasonable doubt, or even by the burden of the evidence, but it is sufficient if accused raises in the minds of the jury a reasonable doubt as to whether at the time of the commission of the crime he was of sound mind, and if the jury entertain a reasonable doubt on the subject he should be acquitted, is objectionable as misleading.

JUDGMENT AND SENTENCE.

People v. Byzon, Illinois, 108 N. E. 685. *Vacation of judgment on plea of guilty.*

Where accused 18 years old and unacquainted with methods of criminal procedure, pleaded guilty in reliance of representations by the officer arresting him that he would be released under the probation law, on pleading guilty, the court should vacate the judgment entered on the plea and permit withdrawal thereof, though the court offered to appoint counsel for him and advised him of the effect of a plea of guilty.

SOLICITATION BY POLICE OFFICER.

Hyde v. State, Tenn., 174 S. W. 1127. *For purpose of detection.* A statute prohibits the sale, barter, distribution or gift of opium or any compound derivative or preparation therefrom; except (a) The dispensation or distribution of such drugs to any patient by any registered physician, dentist, or veterinary surgeon in the course of his professional practice only when personally attending such patient, (b) The sale, dispensation or distribution of such drugs by registered pharmacists under a written prescription issued, dated and signed by a registered physician, dentist, or veterinary surgeon. A detective went to the defendant's office and asked for a prescription for morphine for one Louise Walker whose address he gave. No such person existed and there was no such street address as that given. Defendant issued the prescription and was paid for it. The detective took it to a pharmacy where it was filled. The detective paid for the morphine. The defendant was then charged with a violation of the statute and convicted. An appeal was taken, one ground being that the prescription was issued at the solicitation of an agent of the state government for the purpose of a criminal prosecution, and that the drug was not to be used. Held, that by the overwhelming weight of authority such acts of government agents do not detract from the guilt of the person who has violated the statute. Prosecutions for larceny, where the owner of the stolen goods has consented to their being taken, so that no trespass was committed, were distinguished. It was immaterial that Louise Walker was a ficticious person. There was a sale by the druggist to the detective, based upon the prescription. As the sale was induced by the prescription "proceeding from one on whose discretion as trusted agent of society the legislature had made the dispensation of the drug to depend," the physician is a principle in the illegal sale. The fact that the alleged patient did not exist shows at once the recklessness of the accused and a substantial reason for the requirement that a prescription should be given only to a patient actually attended. Otherwise habitual users could obtain the drugs by getting prescriptions made out to ficticious persons.

Legislation *Ex Post Facto* In Changing the Punishment for Crime. — The United States Supreme Court considers the constitutionality of a statute of South Carolina changing the punishment of murder from hanging to electrocution, so far as regards such an offense committed prior to the statute is concerned, and upholds same as not being an *ex post facto* law. *Maloy v. South Carolina*, 35 Sup. Ct. 507.

Mr. Justice McReynolds, in speaking for the court, refers to *Calder v. Bull*, 3 Dall. 386, 390, as to the constitutional sense of *ex post facto* law, wherein it is said that: "Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed" is an *ex post facto* law.

The contention was made that: "Any statute enacted subsequent to the commission of a crime which undertakes to change the punishment therefor is *ex post facto* and unconstitutional unless it distinctly modifies the severity of the former penalty." If we substitute for the word "modifies," the word, mitigates or lessens, the contention would be more sharply expressed.

But in this inquiry we should remember that the constitutional expression, "ex post facto law" is a limitation on state power, and it not being imposed the state would be free even to make more severe the punishment that has been affixed to the punishment of a prior crime. State constitutions generally contain the same prohibition on legislative power. The same observation is per-

tinent as to them. Its presence, however, in one constitution or the other implies the necessity of putting a curb on legislative power. The conclusion, therefore, is irresistible that the words of limitation must be taken according to the sense in which they are used.

Calder v. Bull, supra, was decided in the very early history of our country and similar provisions in state constitutions ought to be taken in the same sense in which it was construed, unless we may suppose that a right amply protected by the federal Constitution and from abundance of caution carried into state constitutions, was declared in a different sense in the latter. There is a well recognized rule that when a statute of one state is carried into the laws of another state, it goes there with prior construction. Why is not the same rule applicable to constitutional provisions?

Taking it, then, that we are seeking to ascertain whether a law is *ex post facto,* we must inquire, as a fact, whether, as in the case before the court, it "inflicts a greater punishment than the law annexed to the crime when committed."

We believe it was urged by Patrick that an unapplied-for commutation from execution to life imprisonment was a violation of his constitutional right, and it may be conceivable that one might prefer to be executed than doomed to suffer life imprisonment. But his claim was overruled, and rightly, too, we think, because the mere preference of a convict is no criterion by which to judge the constitutionality of a law. In well understood acceptance the death penalty is regarded as the supreme punishment of American law. Anarchists may well be thought less deterred by the death penalty for their acts than by solitary imprisonment for the remainder of their life. But the law would regard the latter punishment as a mitigation of the former.

And so if the means or method of inflicting death—a sudden snuffing out of the vital spark instead of slow strangulation to the end—is changed, some convicts might prefer the strangulation. But the law may declare that the former is a mitigation in severity of the latter, though instances have occurred where death by strangulation did not supervene, though officially declared to have so done.

Refinement such as plaintiff in error invoked have not so great place in discussing the meaning of a limitation on power as it might have in considering the extent of a granted power, which in itself is a limitation on right.

This limitation on the right of a state is construed by our supreme court as it generally construes other similar restrictions in the federal Constitution, that is to say, the words of the Constitution are taken as controlling actual, practical considerations and not according to metaphysical claims hindering their application. By this kind of construction only may our dual system of government preserve to the general government and to the states their rightful control, whether in public functions or the regulation of private right. The contention of plaintiff in error was disallowed.—From *Central Law Journal,* May 21, 1915.

Evidence As To Trailing By Dogs. — It is a matter of common knowledge that certain breeds of dogs possess the peculiar faculty of trailing by scent. Proof of such trailing is admitted by the courts only upon the most satisfactory evidence of scenting ability. Rules for laying proper foundation for admission of evidence of trailing by dogs are stated in detail in *Fite v. State,*

84 S. E. 485: "Evidence as to the conduct of dogs in following tracks should not be admitted until after a preliminary investigation, in which it is established that one or more of the dogs in question were of a stock characterized by acuteness of scent and power of discrimination, and had been trained or tested in the exercise of these qualities in the tracking of human beings, and were in the charge of one accustomed to use them. It must also appear that the dogs so trained and tested were laid on a trail, whether visible or not concerning which testimony has been admitted, and upon a track which the circumstances indicate to have been made by the accused. When these preliminary tests have been made, the fact of tracking by a bloodhound may be permitted to go to the jury as one of the circumstances which may tend to connect the defendant with the crime with which he is charged. Should the preliminary investigation disclose either that the dog was not of proper stock or untrained, or not in the charge of a person familiar with such dogs, or was not placed upon a trail connected at least by circumstances with the defendant, the trial court should exclude the entire testimony as to the conduct of the dogs. When such a foundation as that referred to above has been laid, and evidence showing the conduct of the dogs has been received, the jury should be charged, in substance, that before they can consider the conduct of the dogs they must find that the dogs were accurate, certain, and reliable in following the trail of human footsteps, and that if they find this, then the evidence of the conduct of the dogs and its result may be considered, together with all the other evidence in the case, as a circumstance in determining the guilt or innocence of the defendant.—*So. Rep.* Vol. 67, No. 11.