Journal of Criminal Law and Criminology

Volume 10 | Issue 4 Article 9

1920

Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND WILLIAM G. HALE

ARREST OF JUDGMENT.

People v. *Goldberg* (Ill.), 122 N. E. 530. *Mistake in name.*

The defendant was described in one count of the indictment as Philip *Holdberg,* in another as *Philup* Goldberg, and in the remaining counts as Philip Goldberg. He was found guilty under the entire fifty counts.

Held, that a motion in arrest of judgment should have been sustained. The names Philip and Philup are idem sonans, but the names Goldberg and Holdberg are not. The state should have nollied the count against Holdberg.

ASSAULT AND BATTERY.

State v. *Lesesne* (S. Car.), 100 S. E. 62. *Deducing intent to resist arrest from common design to flee.*

Four defendants were arrested for assault and battery and convicted upon evidence showing that all attempted to escape, that one of the arresting officers was struck by a frying pan, but there was no evidence to show whether the blow was struck by one of the four defendants or by one Price who has not joined in this appeal.

Held, the conviction can be upheld on the jury finding that all had formed a common design to escape by flight.

Hydrick, J., dissenting on the ground that proof of facts warranting an inference of common design to avoid arrest is not sufficient to warrant the further inference of a common design to commit assault and battery upon an officer who might attempt to arrest them for gambling.

ASSAULT TO MURDER.

People v. *Brown* (Ill.), 123 N. E. 515. *Malice.*

The element of malice is the same in the offense of assault with intent to commit murder as in the crime of murder itself. The circumstances must indicate that the attack was made with an abandoned and malignant heart, so that if death had resulted it would have been murder.

CONSPIRACY.

State v. *Taylor* (N. J.), 107 Atl. 423. *Admissibility of evidence in denial of.*

On a trial for conspiracy, defendant was asked questions which sought to establish that his alleged co-conspirator was addicted to the excessive use of liquor, and to such an extent that he would be incapacitated for weeks at a time, during which he was mentally incompetent and incoherent, and that those facts were known to the defendant before and at the time it was alleged that he entered into the conspiracy with him; the purpose being to have the jury

pass upon the question as to whether or not it was probable to make such a combination with such a man. The trial court overruled the questions, but this was reversed by the Supreme Court on error.

Held, that the questions asked were incompetent, and that the judgment of the Supreme Court should be reversed to the end that the trial court be affirmed.

Minturn and Taylor, JJ., dissenting.

CONSTITUTIONAL LAW.

State v. *Heitman* (Kans.), 181 Pac. 630. *Constitutionality of statute establishing penal farm for women.*

Chapter 298 of the laws of 1917, establishing an institution known as the industrial farm for women, for the detention and care of women convicted of criminal offenses, does not violate any of the provisions of the Fourteenth Amendment of the Constitution of the United States, because a woman convicted of misdemeanor is sentenced to the farm for an undetermined period, with a maximum limit, while a man convicted of the same misdemeanor is sentenced, under the general law, to the county jail for a definite period, within the same maximum limit.

State v. *Moon* (N. Car.), 100 S. E. 614. *Validity of statute denouncing cohabitation after bigamous marriage in another state.*

Revisal, 1905, sec. 3361, as amended by Laws, 1913, c. 26, denouncing cohabitation within North Carolina after bigamous marriage outside of the state.

Held, not constitutional as punishing for a crime committed outside of the terretorial limits of the state, following similar decisions in Alabama, Iowa, Massachusetts, Minnesota, Missouri, Tennessee, and Vermont.

DESERTION AND NON-SUPPORT.

Ex parte Brennan (Nev.), 183 Pac. 310. *Venue.*

Prosecution of husband for desertion and non-support of wife and child under Act of Pennsylvania, March 13, 1903 (P. L. 26), need not be instituted at the place of his residence, or county in which offense was alleged to have been committed, but may be instituted wherever relief may be needed; such statute, in view of sec. 2, and in view of Act, April 13, 1867 (P. L. 78), to which it is supplementary, being remedial as well as penal, with purpose of affording relief to dependent wives and children.

DISORDERLY HOUSE.

People v. *Ryberg* (Ill.), 122 N. E. 545. *Permitting an unmarried female under 18 to stop in an assignation house.*

The defendant was convicted under Hurd's Rev. Stat., C. 38, sec. 57d, of allowing an unmarried female under the age of 18 years to live, board, stop and room in a house of prostitution.

Held, "It is not an element of this crime that the female was practicing prostitution there, or that she shall be even lacking in virtue. The statute was designed for the protection of girls, and if the keeper of such house permitted one of the prohibited class to stay therein, she did so at her peril."

DOUBLE JEOPARDY.

State v. *Mowser* (N. J.), 106 Atl. 416. *Former conviction of robbery as a bar to further prosecution for murder.*

Held, that under Crimes Act, sec. 106, providing that any person who kills another in attempting to commit a robbery shall be guilty of murder, where defendant pleaded guilty to an indictment for robbery, his conviction barred a subsequent prosecution against him for murder of person robbed, when defendant's accomplice killed him to accomplish the robbery.

Walker, Ch., and Williams, J., dissenting.

State v. *Slorah* (Me.), 106 Atl. 768. *Discharge of jury for "urgent necessity."*

Defendant accused of murder, when jury which was to view the locus of crime reached the premises, fell or threw himself down and cried in the presence of the jury, "My God! take me away from here or I shall be insane again."

Held, there was such "urgent necessity" created as to warrant presiding justice in withdrawing case from the jury.

Nor was such discharge a bar to another trial on the same indictment.

EVIDENCE.

People v. *Curtis* (N. Y.), 122 N. E. 623. *Res Gestae. Spontaneous exclamations.*

The defendant ran his automobile against a vehicle and threw the occupant out. The automobile was stopped while some one who was riding with the defendant got out and investigated. This person shortly re-entered the car and the defendant drove on. Within ten seconds after the defendant left, the injured man was heard to cry out, "Oh, my God, get me help; get me a doctor."

Held, this remark was admissible as part of the *res gestae.* The test of the admissibility of such declarations is stated as follows: "The admission in evidence of the declarations of an injured person constitutes an exception to the general rule that excludes hearsay evidence, and is justified when the declarations are so spontaneous or natural as to exclude the idea of fabrication."

FORGERY.

State v. *Frasier* (Ore.), 180 Pac. 520. *Canceled check.*

A canceled check or check indorsed and stamped "Paid" may be the subject of forgery under L. O. L., sec. 1996, such an instrument serving in the business world as a voucher or receipt for the payment of the amount of money named in the check.

HABEAS CORPUS.

Rumley v. *McCarthy,* U. S. Marshall, 39 Sup. Ct. Reptr. 483. *Scope of writ.*

Petitioner's contention that he could not be punished for failure to report to the alien property custodian, as required by Trading with the Enemy Act, sec. 7 (Comp. Stat., 1918, sec. 3115½d), because such report would show that he had been trading with the enemy in violation of the act and compel him to bear witness against himself contrary to the Fifth Amendment, is unavail-

able on habeas corpus to obtain discharge from commitment into custody for removal to the District of Columbia, where the indictment was returned; the constitutional question being matter for defense.

The chief justice dissenting.

HOMICIDE.

State v. *Bethune* (S. Car.), 99 S. E. 753. *Resisting unlawful arrest.*

One has the right to defend himself from an unlawful arrest, and for the purpose of so protecting himself may use whatever force is necessary, even to the extent of taking the life of him who is seeking to make the unlawful arrest, if that be apparently necessary to a man of ordinary courage in the circumstances.

INTERSTATE COMMERCE.

United States v. *Ferger,* 39 Sup. Ct. Reptr. 445. *Counterfeiting bills of lading.*

The power of Congress, under Const., art. 1, sec. 8, to regulate foreign and interstate commerce and to make all laws necessary and proper for carrying into execution such power, includes the power exercised in Act August 29, 1916, sec. 41, to penalize counterfeiting and use of a fictitious bill of lading, where there was no actual or contemplated commerce; commerce being interfered with by such an instrument.

Mr. Justice Pitney dissenting.

JUVENILE COURT.

Lindsey v. *People* (Colo.), 181 Pac. 631. *Statement to juvenile court judge—when privileged.*

In prosecution of a mother for the murder of the father, statement of twelve-year-old son to juvenile court judge was not privileged upon judge being called as witness, irrespective of statute, since benefit to be obtained by correct disposal of the litigation was infinitely greater than any injury which could possibly inure to the relation by disclosure of the communication.

Nor is such a statement privileged under Rev. Stat., 1908, sec. 586, as amended by Laws, 1909, p. 334, the boy not being a ward of the court, nor under sec. 7274, par. 5, making communications to a public officer in official confidence privileged when public interests, in judgment of the court, would suffer; the presiding judge and not witness being sole judge as to necessity regarding communication as privileged.

Nor was such statement privileged by reason of the supposed powers and duties conferred by statute in its capacity of parens patriae upon the judge and his assumed position in loco parentis, and if such privilege existed it was for the benefit of the boy and not his mother or the judge.

Bailey, Scott, and Allen, JJ., dissenting.

LARCENY.

State v. *Donavan* (Wash.), 183 Pac. 127. *Outlawed whiskey as the subject of larceny.*

Outlawed whiskey may be the subject of grand larceny where taken from one claiming ownership, although the law would not afford any damages for its taking or give any one relief looking to its recovery.

LIMITATIONS.

State v. *Gregory* (N. J.), 107 Atl. 459.

The defendant was indicted and convicted of a conspiracy to cheat and defraud. One of the conspirators, by a false representation, obtained from the victim of the conspirators, $25,000, upon an agreement to divide it equally among the conspirators; but he falsely represented to them that he obtained only $20,000, which was divided, defendant getting a share. Subsequently, defendant ascertaining that he had been defrauded by his co-conspirator, demanded and was paid a share of the residue of the money extorted.

The first division was more than two years prior to the finding of the indictment, but the last was within the statutory limitation.

Held, that the last division was a continuance of the conspiracy, and that the original conspiracy to cheat and defraud a person and divide the proceeds was not completed until after the contemplated division of the proceeds was finally concluded, and if there was a division within two years, that being the statutory limitation, before the indictment was found, the statute was not a bar because the crime was not concluded by the limitation until two years after the last overt act in furtherance of the corrupt agreement.

MOTOR VEHICLE LAW.

People v. *Johnson* (Ill.), 123 N. E. 543. *Destruction or concealment of manufacturer's identification mark.*

The following section of the Motor Vehicle Law was held constitutional: "Any person having in his or her possession any motor bicycle or motor vehicle from which the manufacturer's serial number, or any other manufacturer's trade or distinguishing number or identification mark, has been removed, defaced, covered, or destroyed for the purpose of concealing or destroying the identity of such motor bicycle or motor vehicle shall be liable to a fine of not more than two hundred dollars ($200.00) or imprisonment in the county jail for a period not to exceed six (6) months, or both."

PAROLE LAW.

People v. *Moses* (Ill.), 123 N. E. 634. *Conspiracy—sentence to definite term.*

The defendant was convicted of the crime of conspiracy to defraud and sentenced to a definite term of 18 months in the state penitentiary. One of the alleged errors was that the trial court directed the jury to fix the punishment, whereas the parole law requires an indeterminate sentence. The judgment was affirmed on the ground that the parole law does not apply to the crime of conspiracy. The argument in support of this view is that the punishment fixed by the Criminal Code for this crime is imprisonment for not more than five years, or a fine not exceeding $2,000, or both. By construction the minimum term in such case is one day. Since under the parole law no one is eligible to parole until he has served at least one year, it could not apply to

the crime of conspiracy unless it had the effect of amending the provision of the criminal code by increasing the minimum term of imprisonment from one day to one year. To give it such a meaning would render it unconstitutional.

The decision is also explicit in holding that under no circumstances is a person eligible to parole until he has served at least a term of one year of imprisonment, and if the minimum term provided by law exceeds one year, then the prisoner must serve that minimum term before he can be paroled.

PLEADING.

Bennett v. *State* (Ind.), 123 N. E. 797. *Defective indictment.*

The defendant was convicted of assault and battery under an indictment which was intended to charge the offense of assault and battery with intent to commit murder. The indictment was defective in respect of the more serious offense, but properly charged the lesser offense.

Held, conviction sustained conviction of the lesser offense only, made the defect in the indictment immaterial.

Fountain v. *Maryland* (Court of Appeals of Md., No. 23) (July, 1919). *Presence of mob threatening prisoner as basis for postponement of trial.*

During the trial of the accused, a negro, for rape, a large mob gathered about the court house and jail with a view to seizing and lynching him. About ten o'clock p. m., on the first day of the trial, at the close of a night session of the court, while the prisoner was being taken from the court house to the jail, the mob made a determined and violent effort to take him from the custody of the officers. During the melee the prisoner escaped. Thereafter, in the presence of the jury the court commented "upon the disgraceful proceeding resulting in the escape of the prisoner," offered a reward of five thousand dollars for his capture and safe return and suggested the swearing in of all those assembled, who would volunteer as deputy sheriffs for that purpose. Two days later the accused was captured and returned into custody, and the trial was resumed. Rumors that the former mob was to be increased by three or four thousand, led the court to accept the offer of the governor of the state to send a company of militia and to call for twenty-five members of the Baltimore police force, all of whom were used as guards about the court house and jail. The jurymen were escorted through rows of the militiamen who stood with drawn bayonets.

When court reconvened the defendant filed a motion for a postponement of the trial. The motion set out the facts above enumerated and averred that the defendant "by reason of the interruption of the orderly procedure of the administration of justice due to mob violence actually perpetrated upon him while in the custody of the law and in the actual trial of his case (from which mob violence he attempted to escape by flight because of the insufficient protection of law), finds himself so prejudiced in the further progress of said case as to be utterly and hopelessly unable to receive a fair and impartial trial by any further action in the present so-called trial and proceeding, and that the same amounts to a denial of all constitutional guarantees of a fair and impartial trial, or to the constitutional right of a jury trial." The motion was denied, the prisoner was convicted and sentenced to death. On July 17, 1919, the Maryland Court of Appeals filed an opinion reversing the judgment and awarding a new trial. The trial court said in part:

"The appeal in this case presents a question of vital importance in the administration of justice. It is concerned with the right of a person charged with crime to have the question of his guilt or innocence determined by a fair and impartial trial according to law. This right is absolute and fundamental. It rests upon the clearest and strongest principles of justice, and it is safeguarded in the most imperative terms by constitutional provisions which directly declare the will and mandate of the people.

"The issue tried before the jury in this case was whether the prisoner at the bar, who is a colored man, was in fact the negro who committed the rape charged in the indictment. There was no question that the unfortunate girl who testified as prosecuting witness had been brutally outraged, but the defense was that the accused was not the perpetrator of the horrible crime, and that he was in reality a number of miles distant from the scene of the assault at the time it occurred. It was his undoubted right to raise such an issue of fact and to have it determined by the verdict of a jury under circumstances which would enable it to exercise its independent judgment. He was entitled to have the verdict represent solely the effect of the evidence and not the influence of popular sentiment. In order that the defense interposed might be impartially considered it was necessary that the jurors should have the opportunity to calmly weigh the evidence without having their minds distracted and dominated by undue manifestations of public hostility against the prisoner.

"The conditions under which the appellant was tried were such as to make it almost impossible for the issue upon which his life depended to be impartially considered and decided by the jury. It is in the highest degree improbable that the jury as a whole could have kept its judgment free from the influence of the demonstrations made against the accused in the immediate neighborhood of the court in which the trial was being conducted. The presence of a large and menacing crowd determined that the prisoner should die and unwilling to await the orderly processes of the law, which had been set in motion with the utmost promptness, the attempt to forestall by lynching the verdict of the jury and a judicial sentence, the flight of the defendant to escape immediate death at the hands of the mob, and the unusual measures taken by the court to insure his safety when recaptured, evidencing the belief of the judges as to the extreme gravity of the emergency with which they were confronted, combined to create an atmosphere and environment incompatible with the right of the accused to a fair and impartial trial. . . .

"It is not our duty or right to pass upon the weight of the evidence and to express an opinion as to its sufficiency to support the verdict actually rendered. That was a question which the appellant was entitled to have decided by a jury exempt from such influences as those which operated in this case and by which any jury of ordinary human sensibilities would have been practically certain to have been affected prejudicially to the accused.

"It is natural that popular wrath and indignation should be aroused by such an atrocious offense as this record discloses. But the identification and punishment of the criminal must be left to the careful and regular processes of the law, however deep and just may be the public sense of horror at the crime. The law does not tolerate any interference with the right of the humblest individual to be accorded equal and exact justice, and, when charged

with crime, to have the question of his guilt or innocence fairly and impartially determined. It is of the highest concern to the people and courts alike that this vital and sacred right shall be preserved inviolate."

It seems superfluous to add anything by way of argument in support of a decision so obviously sound. In these days of prevalent disorder it is highly desirable to exalt and safeguard the established machinery of righteous government. And it is not too much to expect that all those who are worthy of the name as good citizens will now as never before stand vigorously for law and order and patiently abide the results of the orderly administration of justice. Decisions of the character here presented are timely.—William G. Hale.

RAPE.

Branham v. *State* (Okla.), 182 Pac. 585. *Previous chaste character.*

In a prosecution for statutory rape of a female over 16 and under 18 years of age, evidence of an act of criminal intercourse by the defendant and prosecutrix, prior to the time of the specific act of sexual intercourse charged in the information, does not show that the prosecutrix was not of chaste and virtuous character. A defendant cannot shelter under a violation of a criminal law by him and thereby escape prosecution.

Williams v. *State* (Okla.), 184 Pac. 788. *Proof of defendants age in statutory rape a matter of defense.*

Sec. 2415, Rev. Laws, 1910, providing, "Nor can any person be convicted of rape on account of an act of sexual intercourse with a female over the age of fourteen years, with her consent, unless such person was over the age of eighteen years at the time of such act."

Construed and *held,* that proof that defendant was over the age of eighteen years at the time of the commission of the alleged act is not indispensable to a conviction; the age of defendant being a matter of defense, and not a material element of the crime.

SEDITION.

State v. *Kahn* (Mont.), 182 Pac. 107. *Right of state to punish sedition.*

Grant of war powers to Congress by Const., U. S., art. 1, sec. 8, construed with article 6, making the laws of the United States the supreme law of the land, and article 1, sec 10, forbidding state to engage in war unless in imminent danger, is not so exclusive as to prohibit definition and punishment of sedition, as is done by Laws, 1918 (extra sess.), ch. 11, in view of Const., U. S., Amend. 10, giving states powers not delegated, as state is in duty bound to aid United States in war, as is recognized in Const., Mont., art. 12, sec. 12.

SENTENCE.

Harris v. *State* (Okla.), 181 Pac. 944. *Ambiguous verdict.*

Where jury by one verdict assessed a fine of $50 and 30 days' imprisonment, and by another a fine of $500 and 6 months' imprisonment, without designating in either verdict the name of either H or D, jointly tried for unlawful possession of intoxicating liquor, it was impossible to say that they showed an intention to give H the maximum punishment, and court's maximum sentence

against him should be modified to provide a fine of $50 and imprisonment of 30 days.

State v. *Moran* (Nev.), 182 Pac. 927. *Validity of Nevada suspended sentence statute.*

Rev. Laws, 1912, sec. 7259, authorizing court to suspend sentence except in specified cases is unconstitutional; there being no constitutional authority therefor, and method of suspending sentence provided in Const., art. 5, secs. 13, 14, being exclusive. Where the constitution enumerates certain cases in which the collection of a fine may be suspended, or certain methods whereby it may be done, or confers such power upon certain officials, the power so conferred is exclusive.

TRIAL.

Fountain v. *State* (Md.), 107 Atl. 554. *Mob violence as ground for giving negro defendant continuance.*

Where a negro being tried for rape was assaulted by a mob, which tried to lynch him while he was being taken from the court house to the jail, but he escaped in the resulting confusion and was recaptured within a few days and his trial continued, under protection of the state militia, over objection that public feeling prevented a fair trial.

Held, that refusal to grant continuance constituted an abuse of discretion.

Steel v. *State* (Ga.), 99 S. E. 305. *Omission to permit accused to make statement before sentence.*

Held, no error for trial court, before imposing sentence upon one convicted of a capital offense to omit to ask the accused what he has to say as to why sentence should not be pronounced upon him. Especially is this so where it does not appear that the accused has suffered injury thereby.

CONSTITUTIONAL LAW.

State v. *Emonds* (Wash.), 182 Pac. 584. *Validity of statutory punishment for illegal issuance of prescriptions for intoxicating liquor.*

Initiative Measure Number 3 (Laws, 1915, p. 6), sec. 8, providing, among other things, that it shall be unlawful for a physician, after he has been convicted a second time of a violation of any of the provisions of the act, to thereafter write any prescription for the furnishing, delivery or sale of intoxicating liquor, is valid.