

Spring 1930

Judicial Decisions on Criminal Law and Procedure

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Recommended Citation

Judicial Decisions on Criminal Law and Procedure, 21 *Am. Inst. Crim. L. & Criminology* 145 (1930-1931)

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JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND HAROLD SHEPHERD, EDs.

APPEAL

People v. Stevenson, Calif. D. C. A., 284 Pac. 487. *Burden of showing prejudicial error.*

In prosecution for theft, where district attorney used transcript of testimony before grand jury during its examination of certain witnesses but refused to permit inspection of transcript by defendant, and court refused to order district attorney to permit defendant's counsel to inspect and use transcript, people could not invoke provisions of Const. art. 6, Section 4½, to effect that burden is on appellant to show prejudicial error, since the only way in which prejudicial error could be shown was by inspection of transcript and this right had been denied defendant.

Const. Art. 6, Section 4½, to effect that burden is on appellant to show prejudicial error, does not contemplate situation where complaining party without fault has been denied an opportunity to determine whether or not he has been prejudicially injured.

People v. Rongetti, Ill., 170 N. E. 14. *Harmless error.*

Notwithstanding the rule that, where the evidence is such that the jury could not reasonably have found verdict other than one of conviction, the appellate court will not reverse for error in giving or refusing instruction, or for other error not prejudicial in character, yet, where such errors result in the denial of a fair and an impartial trial, the Supreme Court will not affirm the conviction on the theory of accused's guilt.

BRIBERY

People v. Keyes, Calif., 284 Pac. 1105. *Conspiracy to bribe.*

Unlawful agreement between two parties, the one to give, and the other to receive, a bribe, does not constitute a criminal conspiracy, since bribery requires for its commission the unlawful concert of one or more persons acting with one or more other persons having a different motive or purpose.

Fact that defendant was wrongfully charged with criminal conspiracy to receive a bribe was immaterial, in view of existence in indictment of ample allegations showing unlawful and felonious agreements to accept a bribe, which was sufficient to charge offense of bribery under Pen. Code, Section 68, particularly since punishment for substantive offense and for conspiracy to commit it is the same, and defendant therefore suffered no substantial injury by reason of conviction for conspiracy.

Langdon, J., dissenting.

ENTRAPMENT

State v. Prince, Utah, 284 Pac. 108. *Extortion, where payment is motivated both by fear and desire to entrap.*

In prosecution for extortion, under Comp. Laws 1917, Section 8320, evidence that complaining witness, an illiterate foreigner with large family, had by threats been placed in fear of his life, and although he notified officers, who gave him marked money to pay defendant, his fear did not abate prior to payment of money, it was proper to refuse instruction to acquit, for, though entrapment may have been one of motives, fear remained as controlling motive, and it was unnecessary for it to be sole motive.

HABITUAL CRIMINAL

People v. Braswell, Calif. D. C. A., 284 Pac. 709. *Prior offenses need not occur or be tried separately.*

Under Pen. Code, Section 644, as amended by St. 1927, p. 1066, construed so as to give effect to all provisions thereof, as required by Code Civ. Proc. Section 1858, three prior convictions of any felony are sufficient to constitute fourth offender an "habitual criminal," whether they were on charges separately brought and tried or not.

HOMICIDE

State v. Besares, Utah, 283 Pac. 738. *Act of sexual perversion as justification.*

Where defense in prosecution for murder was that homicide was justifiable, under Comp. Laws 1917, Section 8032, subd. 4, in that defendant had discovered her daughter and deceased engaged in unnatural act of sexual perversion, called "cunnilingus," refused to instruct that act or attempt to commit act of sexual perversion, such as cunnilingus, is "defilement" of female, within such statute, held error, since "defile" means to corrupt chastity of, or to debauch.

PROBATION

People v. Superior Court, Calif., 284 Pac. 449. *Effect of previous conviction of felony.*

On May 21, 1928, motorist entered plea of guilty on charge of manslaughter arising from automobile collision on November 12, 1927. On November 16, 1927, four days after commission of manslaughter offense motorist was convicted of failing to stop and render aid on August 23, 1927, in violation of Pen. Code, Section 367c. Motorist filed application for probation in manslaughter charge. Held, court had power to entertain and act on such application under Pen. Code, Section 1203, as amended by St. 1927, p. 1493, for provision therein that probation should not be granted to any defendant unless court should be satisfied that he had never been previously convicted of felony applies to time of commission of offense, and not to time when application for probation was made.

TRIAL

State v. Mayer, Wash., 283 Pac. 195. *Effect of defendant's failure to testify.*

While mandatory requirement that court instruct jury that no inference of guilt arises against accused on account of his failure to testify as witness, pro-

vided by Rem. Comp. Stat. Section 2148, is abrogated by Rule IX of Supreme Court, adopted January 14, 1927, 140 Wash. xli, defendant nevertheless has right to have such instruction given to the jury, when it is properly requested, and defendant has not testified.

In prosecution of two defendants for larceny, in which one of defendants testified, trial court's refusal of instruction, requested in behalf of both defendants, that no inference of guilt should arise against defendants from failure of defendant to testify as witness in his or her behalf, under provisions of Rem. Comp. Stat. Section 2148, as modified by Rule IX of Supreme Court, *held* error, requiring reversal as to defendant not testifying, since request, though given in plural form, should be construed as having been made in behalf of each defendant separately.

TRIAL

People v. McLaughlin, Illinois, 169 N. E. 206. *Effect of improper argument by prosecution.*

In prosecution for assault with intent to commit robbery, argument of counsel for prosecution that gun admitted in evidence was the kind used by gunmen in Chicago, that jury indicted "these gunmen," and that, if jury returned verdict of not guilty, they would be "putting back on streets a gunman who may ply his trade with you," *held* improper and prejudicial, requiring reversal, notwithstanding fact that statements were stricken on objection, and jury instructed to disregard them.

TRIAL

Commonwealth v. O'Keefe, Pa., 148 Atl. 73. *Due process where defendant tried on day of arrest.*

Action of trial court in forcing defendant to trial for possessing and selling liquor on day of his arrest, and in spite of statement of his counsel as to impossibility of being then prepared for trial, deprived defendant of his constitutional rights under Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property without due process of law, and Const. Pa. art. 1, Section 9, providing that accused cannot be deprived of life, liberty, or property, unless by law of land.

WITNESSES

Locke v. State, Ohio, 169 N. E. 833. *Wife as witness—waiver.*

State's use of defendant's wife as witness against him in prosecution for murder, in violation of defendant's privilege under Gen. Code, Section 13659, as to communications had with wife, *held* not waived, though wife was sworn without objection and her examination proceeded to some length, where objection was interposed on ground of wife's incompetency as witness when state first connected defendant with shooting, which was committed in wife's presence.

In prosecution for murder committed by defendant in presence of his wife, admission of testimony of wife as to conversation with husband, not had in the known presence of third person, *held* error, requiring reversal, under Gen. Code, Section 13659, where wife's incompetency was not waived.